

1 **MACDONALD | FERNANDEZ LLP**
2 Reno F.R. Fernandez III (SBN 251934)
3 Matthew J. Olson (SBN 265908)
4 221 Sansome Street, Third Floor
5 San Francisco, CA 94104
6 Tel: (415) 362-0449
7 Fax: (415) 394-5544

8 Attorneys for Plaintiff,
9 SIX4THREE, LLC

10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF SAN MATEO**

12 SIX4THREE, LLC, a Delaware limited
13 liability company,

14 Plaintiff,

15 vs.

16 FACEBOOK, INC., a Delaware corporation;
17 MARK ZUCKERBERG, an individual;
18 CHRISTOPHER COX, an individual;
19 JAVIER OLIVAN, an individual; SAMUEL
20 LESSIN, an individual; MICHAEL
21 VERNAL, an individual;
22 ILYA SUKHAR, an individual; and DOES 1
23 through 50, inclusive,

24 Defendants.

Case No: CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dep't 23

**PLAINTIFF SIX4THREE, LLC'S OBJECTION
TO HEARING BEFORE THE HONORABLE V.
RAYMOND SWOPE ON THE GROUNDS OF
DISQUALIFICATION (CAL. CODE CIV. PRO.
§§ 170.1 AND 170.3); DECLARATION IN
SUPPORT OF OBJECTION**

(UNLIMITED JURISDICTION)

1 **OBJECTION TO HEARING BEFORE THE HONORABLE V. RAYMOND SWOPE ON**
2 **THE GROUNDS OF DISQUALIFICATION (CAL. CODE CIV. PRO. §§ 170.1 AND 170.3)**

3 TO THE CLERK OF THE COURT, THE PARTIES, AND THEIR COUNSEL OF RECORD:

4 Notice is hereby given that Plaintiff Six4Three, LLC objects to Judge V. Raymond Swope
5 presiding over any case management conference, any motions to seal, any contemplated discovery,
6 or any other proceedings in this action. This objection is made on the grounds set forth in the
7 attached declaration, memorandum of points and authorities filed in support hereof, all other
8 pleadings, records, and papers filed in this action, and on any other evidence and argument as may
9 be considered by the Court prior to its decision on this Objection.

10 DATED: August 6, 2019

MACDONALD FERNANDEZ LLP

11 By: 

12 Matthew J. Olson
13 Attorneys for Plaintiff,
14 SIX4THREE, LLC

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- 1 10. A true and correct Transcript of Proceedings before the Hon. V. Raymond Swope on
2 July 19, 2019 is attached hereto as **Exhibit 7**.
- 3 11. A true and correct copy of Defendant Facebook's Case Management Statement of
4 February 21, 2019 is attached hereto as **Exhibit 8**.
- 5 12. A true and correct copy of this Court's Order of April 30 is attached hereto as **Exhibit**
6 **9**.
- 7 13. A true and correct copy of this Court's Order of June 19, 2019 is attached hereto as
8 **Exhibit 10**.
- 9 14. A true and correct copy of this Court's Order of August 1, 2019 is attached hereto as
10 **Exhibit 11**.
- 11 15. A true and correct copy of Counsel for Plaintiff's objections to Counsel for
12 Defendants' Proposed Order of August 1, 2019 is attached hereto as **Exhibit 12**.
- 13 16. A true and correct copy of the Notice of Limited Scope Representation file July 2,
14 2019 is attached hereto as **Exhibit 13**.
- 15 17. A true and correct copy of a portion of Defendant-Cross-Respondent Facebook's
16 Brief in the California Court of Appeals, First District, Division Four regarding Appeal Nos.
17 A154890/155334 is attached hereto as **Exhibit 14**.
- 18 18. A true and correct copy of an article by *Palo Alto Online* titled "Facebook's
19 international drama has its day in county court" is attached hereto as **Exhibit 15**.
- 20 19. A true and correct copy of an article by *Fortune* titled "Six4Three Exec Ordered to
21 Surrender Laptop After Facebook Leak" is attached hereto as **Exhibit 16**.
- 22 20. A true and correct copy of an article by *The Telegraph* titled "US Judge seizes laptop
23 used to pass Facebook's confidential documents to British MPs" is attached hereto as **Exhibit 17**.
- 24 21. A true and correct copy of an article by *The Guardian* titled "California judge
25 condemns startup for giving secret Facebook papers to UK" is attached hereto as **Exhibit 18**.
- 26 22. A true and correct copy of an article by *Ars Technica* titled "Judge slams bikini-app
27 maker's lawyers in legal clash with Facebook" is attached hereto as **Exhibit 19**.
- 28

1 23. A true and correct copy of this Court's Order to Show Cause of September 28, 2018,
2 is attached hereto as **Exhibit 20**.

3 24. A true and correct copy of Plaintiff's Response to the September 28, 2018 Order to
4 Show Cause is attached hereto as **Exhibit 21**.

5 I declare under penalty of perjury under the laws of the State of California that the foregoing
6 is true and correct. Executed this 6th day of August, 2019, at San Francisco, California.

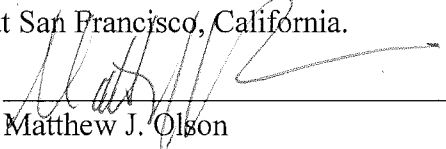
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8 _____
9 Matthew J. Olson
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EXHIBIT 1

1 IN THE SUPERIOR COURTS OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN MATEO

3 ---000---

4
5 SIX4THREE, LLC, A DELAWARE
6 LIMITED LIABILITY COMPANY,

CERTIFIED TRANSCRIPT

7 PLAINTIFFS,

8 VS.

CASE NO. CIV533328

9 FACEBOOK, INC., A DELAWARE
10 CORPORATION, ET AL.,

11 DEFENDANTS.

12 _____/

13 REPORTER'S TRANSCRIPT OF PROCEEDINGS

14 BEFORE: HONORABLE V. RAYMOND SWOPE, JUDGE

15 DEPARTMENT 23

16 NOVEMBER 30, 2018

17
18 A P P E A R A N C E S

19 FOR THE PLAINTIFFS: STUART G. GROSS
20 ATTORNEY AT LAW

21 DAVID S. GODKIN
22 ATTORNEY AT LAW

23 FOR THE DEFENDANTS: JOSH H. LERNER
24 ATTORNEY AT LAW

25 SONAL N. MEHTA
26 ATTORNEY AT LAW

REPORTED BY: GERALDINE VANDEVELD, C.S.R. 8634

P R O C E E D I N G S

REDWOOD CITY, CALIFORNIA

NOVEMBER 30, 2018

--OOO--

THE COURT: GOOD AFTERNOON, EVERYONE. CALLING CASE
NUMBER CIV533328. THE MATTER OF SIX4THREE, LLC VERSUS
FACEBOOK, ET AL. WILL COUNSEL, PLEASE, STATE YOUR APPEARANCES
FOR THE RECORD.

MR. GODKIN: GOOD AFTERNOON, YOUR HONOR.
DAVID GODKIN, BIRNBAUM & GODKIN FOR THE PLAINTIFF SIX4THREE.

MR. GROSS: GOOD AFTERNOON, YOUR HONOR.
STUART GROSS, GROSS & KLEIN FOR PLAINTIFF SIX4THREE.

MR. GODKIN: AND MR. KRUZER FROM MY OFFICE IS HERE,
YOUR HONOR, AS WELL.

MR. THOREEN: GOOD AFTERNOON, YOUR HONOR.
PETER THOREEN FROM ALTSHULER & BERZON ON BEHALF OF
THEODORE KRAMER.

MS. MEHTA: GOOD AFTERNOON, YOUR HONOR. SONAL MEHTA
FROM DURIE TANGRI ON BEHALF OF FACEBOOK. WITH ME JOSH LERNER,
LAURA MILLER, CATHERINE KIM AND ZACHARY ABRAHAMSON. ALL FROM
THE LAW FIRM OF DURIE TANGRI. AS WELL AS PAUL GREWAL, VICE
PRESIDENT DEPUTY GENERAL COUNSEL FOR LITIGATION FROM FACEBOOK.

MR. GREWAL: GOOD AFTERNOON, YOUR HONOR.

MS. MEHTA: AND NATALIE NAUGLE ASSOCIATE GENERAL

1 COUNSEL FOR LITIGATION AT FACEBOOK.

2 MS. NAUGLE: GOOD AFTERNOON, YOUR HONOR.

3 THE COURT: GOOD AFTERNOON. THIS HEARING WAS
4 SCHEDULED BY THIS COURT ON TODAY'S DATE PURSUANT TO AN
5 EX PARTE APPLICATION BY DEFENDANT FACEBOOK, INC. FOR EXPEDITED
6 RELIEF REGARDING SIX4THREE'S DISOBEDIENCE OF A VALID COURT
7 ORDER. FACEBOOK HAS FILED AN EX PARTE APPLICATION SEEKING AN
8 ORDER TO SHOW CAUSE AS TO WHY TERMINATING SANCTIONS AND
9 MONITORING SANCTIONS SHOULD NOT ISSUE AGAINST SIX4THREE, LLC
10 AND ITS COUNSEL.

11 GENERALLY EX PARTE PROCEEDINGS ARE NOT REPORTED.
12 HOWEVER, BECAUSE OF THE GRAVITY OF THE CONDUCT BY THE
13 PLAINTIFF'S PRINCIPAL MR. KRAMER, THIS COURT BELIEVES IT IS
14 ESSENTIAL THAT THESE PROCEEDINGS ARE REPORTED BY A COURT
15 REPORTER AND PRESERVED ON THE RECORD.

16 ON OCTOBER 25TH, 2016, THIS COURT ISSUED A
17 PROTECTIVE ORDER PURSUANT TO A STIPULATION OF THE PARTIES.
18 THIS ORDER WAS BINDING ON ALL PARTIES INCLUDING MR. THEODORE
19 KRAMER. ON NOVEMBER 1ST, 2018, THIS COURT GRANTED A MOTION TO
20 SEAL CERTAIN CONFIDENTIAL DOCUMENTS AND ORDERED STRICKEN
21 CERTAIN EVIDENCE PROFFERED BY THE PLAINTIFF SIX4THREE.

22 LATER, ON NOVEMBER 19TH, 2018, THIS COURT RECEIVED
23 AN EMAIL FROM DEFENDANT FACEBOOK THAT THE HOUSE OF COMMONS
24 DIGITAL CULTURE MEDIA AND SPORT COMMITTEE OTHERWISE KNOWN AS
25 DCMS IN THE UNITED KINGDOM HAD ORDERED MR. KRAMER TO SUBMIT
26 UNREDACTED COPIES OF SIX4THREE'S OPPOSITION TO THE ANTI-SLAPP

1 MOTION. THIS OF COURSE WAS CONTRARY TO MY SEALING ORDER OF
2 NOVEMBER 1ST.

3 ACCORDINGLY, I ISSUED A FURTHER ORDER ON
4 NOVEMBER 20TH, 2018. AND THAT ORDER STATED THE FOLLOWING,
5 QUOTE "NO UNREDACTED COPIES OF PLAINTIFF'S OPPOSITION TO
6 EITHER FACEBOOK'S SPECIAL MOTION TO STRIKE OR INDIVIDUAL
7 DEFENDANT'S SPECIAL MOTION TO STRIKE SHALL BE TRANSMITTED,
8 RELEASED OR SUBMITTED UNTIL FURTHER ORDER OF THE COURT.

9 FAILURE TO COMPLY WILL BE CONSIDERED AN ACT OF
10 CONTEMPT. NOTWITHSTANDING THESE THREE VALID ORDERS THAT WERE
11 ISSUED BY THIS COURT, I'VE BEEN INFORMED THAT MR. THEODORE
12 KRAMER HAS SUBMITTED THESE DOCUMENTS TO THE DCMS COMMITTEE OF
13 THE HOUSE OF COMMONS.

14 NOW, THIS COURT SET A BRIEFING SCHEDULE ON THE
15 DEFENDANT FACEBOOK'S EX PARTE APPLICATION. AND THIS COURT HAS
16 READ AND CONSIDERED THE PAPERS AND THE DECLARATIONS FILED
17 THEREWITH.

18 GIVEN THAT THE DEFENDANT IS THE MOVING PARTY,
19 COUNSEL FOR THE DEFENDANT WILL BE PERMITTED TO PRESENT ITS
20 ARGUMENT FIRST FOLLOWED BY THE PLAINTIFF'S ARGUMENT. BUT
21 BEFORE WE BEGIN WITH THE ARGUMENTS BY COUNSEL, I HAVE A
22 QUESTION FOR MR. KRAMER. SO AT THIS TIME -- AND IT'S ONLY TWO
23 QUESTIONS. I ASK THAT THE -- MR. KRAMER STAND AND BE SWORN IN
24 BY THE COURTROOM CLERK.

25 THE CLERK: PLEASE STAND AND RAISE YOUR RIGHT HAND.

26 (WHEREUPON, THEODORE KRAMER WAS FIRST DULY SWORN.)

1 THE CLERK: THANK YOU. HAVE A SEAT.

2 THE COURT: FIRST, MR. KRAMER, IS EVERYTHING SET
3 FORTH IN THE DECLARATION THAT YOU FILED ON NOVEMBER 26, 2018,
4 AND ALL OF THE ATTACHMENTS THERETO TRUE AND CORRECT UNDER
5 PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA?

6 MR. KRAMER: YES, YOUR HONOR.

7 THE COURT: MY SECOND QUESTION. IS THE SUBJECT
8 LAPTOP THAT IS TO SAY YOUR LAPTOP THAT YOU USED TO TRANSFER
9 THE FILES TO THE USB THUMB-DRIVE IN WORKING ORDER?

10 MR. KRAMER: YES, YOUR HONOR.

11 THE COURT: IS YOUR LAPTOP FULLY FUNCTIONAL?

12 MR. KRAMER: YES, YOUR HONOR.

13 THE COURT: DO YOU HAVE IT WITH YOU TODAY?

14 MR. KRAMER: I DO NOT, YOUR HONOR.

15 THE COURT: OKAY. WELL, AFTER I HEAR THE ARGUMENTS,
16 I'M GOING TO MAKE AN ORDER. AND YOU ARE TO HAVE YOUR LAPTOP
17 PRESENTED TO MR. GROSS NO LATER THAN 8:00 P.M. TONIGHT. DO
18 YOU UNDERSTAND THAT, SIR?

19 MR. KRAMER: YES, SIR.

20 THE COURT: THAT WILL BE AN ORDER OF THE COURT.
21 THAT'S ALL I HAVE TO SAY BEFORE THE ARGUMENTS BEGIN EXCEPT
22 THAT WHEN I ISSUE A VALID COURT ORDER GOVERNING THE CONDUCT OF
23 THE PARTIES IN THIS CASE OR ANY OTHER SUCH COURT ORDER, I
24 EXPECT THESE ORDERS TO BE FOLLOWED. I DO NOT EXPECT A
25 COMPROMISE OF THE INTEGRITY OF THIS JUDICIAL SYSTEM WHICH HAS
26 BEEN DONE.

1 NOW, COUNSEL FOR THE DEFENDANT, ARE YOU READY TO
2 PROCEED WITH YOUR ARGUMENTS?

3 MS. MEHTA: YES, YOUR HONOR. THANK YOU. AT THIS
4 POINT THERE IS NO DISPUTE THAT SIX4THREE, MR. KRAMER AND
5 COUNSEL VIOLATED MULTIPLE ORDERS OF THE COURT AND THAT
6 EVIDENCE HAS BEEN DESTROYED. FACEBOOK'S HIGHEST PRIORITY AT
7 THIS POINT IS TO DETERMINE THE EXTENT OF THE VIOLATION OF THE
8 COURT'S ORDERS AND THE DISSEMINATION OF CONFIDENTIAL
9 INFORMATION, VIOLATION OF THE COURT'S ORDERS AND TO GET TO THE
10 BOTTOM OF WHAT REALLY HAPPENED HERE SO THAT THE COURT CAN
11 ISSUE APPROPRIATE REMEDIAL MEASURES AND APPROPRIATE SANCTIONS.

12 WHAT WE KNOW SO FAR, YOUR HONOR, IS BASED ONLY ON
13 THE DECLARATION OF MR. KRAMER. NONE OF THE OTHER WITNESSES TO
14 THE EVENTS THAT HAPPENED TO THE UNITED KINGDOM OR THE LEAD UP
15 TO THOSE EVENTS HAS COME FORWARD.

16 THE COURT: MS. MEHTA, WOULD YOU BE SO KIND TO SLOW
17 DOWN A LITTLE BIT FOR THE COURT REPORTER.

18 MS. MEHTA: CERTAINLY, YOUR HONOR.

19 THE COURT: THANK YOU VERY MUCH.

20 MS. MEHTA: NONE OF THE OTHER WITNESSES TO THE
21 EVENTS IN THE UNITED KINGDOM HAVE STEPPED FORWARD, SO THE ONLY
22 ACCOUNT THAT WE HAVE AT THIS POINT IS MR. KRAMER'S ACCOUNT.
23 AND THAT ACCOUNT IS PRESUMABLY THE BEST VERSION OF THE FACTS
24 FOR MR. KRAMER. EVEN THAT VERSION OF THE FACTS, THE BEST
25 VERSION THEY'VE BEEN ABLE TO COME UP WITH ESTABLISHES THE
26 FOLLOWING ACCORDING TO MR. KRAMER HIMSELF.

1 FIRST, THAT MR. KRAMER REACHED OUT TO MR. COLLINS OF
2 THE DCMS COMMITTEE AND SENT HIM A SUMMARY OF THE ALLEGATIONS
3 OF SIX4THREE'S ALLEGATIONS IN THIS CASE. A SUMMARY WHICH WE
4 AND THE COURT STILL DO NOT HAVE AND WHICH PRESUMABLY HAS
5 CONFIDENTIAL INFORMATION IN IT. AND THAT IS NOT WITHSTANDING
6 THE FACT THAT FACEBOOK HAS REPEATEDLY REQUESTED THAT SUMMARY
7 THIS WEEK AND SIX4THREE'S COUNSEL HAVE FAILED TO TURN IT OVER
8 TO US OR TO THE COURT.

9 BUT THAT IS ACCORDING TO THE DOCUMENT ATTACHED TO
10 MR. KRAMER'S EMAIL, I'M SORRY, TO HIS DECLARATION. AN EMAIL
11 IN WHICH HE SENT THE SUMMARY TO MR. COLLINS. ANOTHER DOCUMENT
12 TO MR. KRAMER'S OWN DECLARATION ESTABLISHES THAT HE SENT A
13 LIST OF DOCUMENTS THAT MR. COLLINS AND THE DCMS COMMITTEE
14 SHOULD REQUEST. A LIST OF THE LITIGATION DOCUMENTS. THAT
15 LIST IS ALSO SOMETHING THAT SIX4THREE AND ITS COUNSEL HAVE
16 FAILED TO DISCLOSE TO THE COURT AND TO FACEBOOK AND, AGAIN,
17 PRESUMABLY ITSELF INCLUDES CONFIDENTIAL INFORMATION.

18 AFTER PROVIDING MR. COLLINS WITH A SUMMARY OF
19 SIX4THREE'S ALLEGATIONS AND A LIST OF DOCUMENTS TO REQUEST
20 FROM THE LITIGATION, MR. KRAMER PROCEEDED OVER THE COURSE OF
21 WEEKS TO ENGAGE WITH THE COMMITTEE. INCLUDING TO CONFIRM IN
22 AN EMAIL THAT HE HAD IN HIS POSSESSION CONFIDENTIAL AND HIGHLY
23 CONFIDENTIAL DOCUMENTS. AND THEN TO DECLINE A VOLUNTARY
24 REQUEST FOR THE DOCUMENTS AND INSTEAD INVITE A FORMAL ORDER OF
25 THE COURT.

26 AFTER COORDINATING FOR WEEKS WITH THE DCMS

1 COMMITTEE, MR. KRAMER TRAVELED TO THE UNITED KINGDOM WITH
2 DOCUMENTS HE NEVER SHOULD HAVE HAD IN THE FIRST PLACE ON HIS
3 LAPTOP FOR SOME UNSPECIFIED BUSINESS AND CHECKED IN TO A HOTEL
4 1500 FEET AWAY FROM PARLIAMENT. WHILE HE WAS THERE, HE
5 RECEIVED ORDERS FROM THE PARLIAMENT REQUESTING THE DOCUMENTS.

6 THOSE ORDERS -- AND THIS IS ALL BASED ON
7 MR. KRAMER'S ACCOUNT. THOSE ORDERS MADE CLEAR THAT MR. KRAMER
8 WOULD STILL BE SUBJECT TO THIS COURT'S JURISDICTION AND ANY
9 VALID ORDER FROM THIS COURT.

10 THE COURT: BEFORE WE GO ANY FURTHER WITH YOUR
11 ARGUMENTS, YOU SAID THAT MR. KRAMER HAD INVITED A FORMAL ORDER
12 OF THE COURT. DID YOU MEAN PARLIAMENT?

13 MS. MEHTA: THAT'S RIGHT.

14 THE COURT: WE HAVE TWO GOVERNMENTAL ENTITIES HERE.
15 AND IT HAS IMPLICATIONS WITH REGARD TO THE HAGUE CONVENTION
16 AND THE LIKE.

17 MS. MEHTA: YOU'RE PROBABLY RIGHT, YOUR HONOR. WHAT
18 I MEANT TO SAY IS HE INVITED A FORMAL ORDER FROM THE U.K.
19 PARLIAMENT FROM THE DCMS COMMITTEE.

20 THE COURT: THANK YOU.

21 MS. MEHTA: AFTER HAVING RECEIVED THE REQUEST FOR
22 THE ORDERS FROM THE PARLIAMENT, HE SAYS THAT HE DECLINED TO
23 COMPLY WITH THEM. THE SECOND ONE HE SAYS WAS DELIVERED TO HIS
24 HOTEL BY THE SERGEANT AT ARMS OF PARLIAMENT. CONTRARY TO
25 PRESS REPORTS, MR. KRAMER'S OWN DECLARATION DOES NOT SAY THAT
26 THE SERGEANT AT ARMS ESCORTED HIM ANYWHERE OR COMPELLED HIM TO

1 DO ANYTHING. RATHER, MR. KRAMER'S OWN DECLARATION SAYS THAT
2 THE SERGEANT AT ARMS SIMPLY DELIVERED THE SECOND ORDER ORDER
3 NUMBER TWO TO MR. KRAMER.

4 TWO HOURS LATER, HE WAS EMAILED THE THIRD ORDER
5 ORDER NUMBER THREE. THEN ACCORDING TO MR. KRAMER'S OWN
6 ACCOUNT, HE VOLUNTARILY WENT 1500 FEET TO PARLIAMENT, SHOWED
7 UP UNANNOUNCED WITH NO APPOINTMENT AND ASKED TO SEE A MEMBER
8 OF PARLIAMENT. HIS STATED INTENTION WAS TO PERSUADE THE
9 MEMBER OF PARLIAMENT THAT HE WOULDN'T BE TURNING OVER OR
10 SHOULDN'T HAVE TO TURN OVER THE DOCUMENTS. NEVERTHELESS,
11 AFTER VOLUNTARILY SHOWING UP TO PARLIAMENT AND COLD-CALLING A
12 MEMBER OF PARLIAMENT, HE BROUGHT WITH HIM THE CONFIDENTIAL
13 DOCUMENTS ON HIS LAPTOP AND A THUMB-DRIVE FOR THE COPYING OF
14 THE DOCUMENTS.

15 AGAIN, ALL OF THIS ACCORDING TO MR. KRAMER'S OWN
16 DECLARATION WHICH IS PRESUMABLY THE MOST FAVORABLE SET OF
17 FACTS FOR HIM AND HAS NOT YET BEEN SUBJECT TO
18 CROSS-EXAMINATION.

19 THEN, AFTER TURNING OVER SOME UNSPECIFIED SET OF
20 CONFIDENTIAL AND HIGHLY CONFIDENTIAL DOCUMENTS TO THE DCMS
21 COMMITTEE, MR. KRAMER BY HIS OWN ACCOUNT LEFT THE UNITED
22 KINGDOM, DIDN'T CALL HIS LAWYERS TO LET THEM KNOW THIS HAD
23 HAPPENED, DIDN'T ADVISE THE COURT OR FACEBOOK THAT THIS HAD
24 HAPPENED.

25 INSTEAD, HE LEFT THE UNITED KINGDOM, FLEW HOME TO
26 NEW YORK, HAD THANKSGIVING WITH HIS FAMILY AGAIN WITHOUT

1 TELLING ANYONE THAT HE HAD VIOLATED THIS COURT'S ORDERS. THEN
2 SPENT THE FOLLOWING MORNING COLLECTING HIS RECORDS ABOUT THE
3 VIOLATION OF THE COURT ORDER. AND ONLY ON FRIDAY AFTERNOON,
4 TWO DAYS AFTER HE HAD TURNED THE DOCUMENTS OVER TO THE DCMS
5 COMMITTEE ON THIS VOLUNTARY VISIT TO PARLIAMENT DID HE EVEN
6 LET BY HIS OWN ACCOUNT HIS LAWYERS KNOW WHO THEN LET FACEBOOK
7 AND THE COURT KNOW.

8 THOSE ARE THE FACTS THAT WE HAVE NOW BASED ON
9 MR. KRAMER'S UNCONTESTED VERSION OF THE FACTS. WHAT WE ARE
10 ASKING FOR, YOUR HONOR, IS DISCOVERY THAT WOULD ALLOW FACEBOOK
11 AND MORE IMPORTANTLY THE COURT TO GET TO THE BOTTOM OF WHAT
12 ACTUALLY HAPPENED HERE. AND THE EXTENT WHICH FACEBOOK
13 CONFIDENTIAL INFORMATION REMAINS AT RISK OF IMPROPER
14 DISCLOSURE. AND THE EXTENT TO WHICH INDIVIDUALS ASSOCIATED
15 WITH SIX4THREE HAVE VIOLATED THE COURT'S ORDERS INCLUDING
16 MR. KRAMER, MR. SCARAMELLINO, COUNSEL OF RECORD FOR SIX4THREE
17 AND POTENTIALLY OTHERS.

18 WE DON'T KNOW THE FULL EXTENT OF WHAT WAS BREACHED,
19 WHO BREACHED IT OR HOW INVOLVED ANY OF THESE INDIVIDUALS WERE
20 IN THE DECISION TO VIOLATE THIS COURT'S ORDER. WE'VE MADE A
21 NUMBER OF REQUESTS FOR DISCOVERY IN TERMS OF WRITTEN DOCUMENTS
22 AND DEPOSITIONS OF THE RELEVANT PARTIES IN OUR EX PARTE
23 PAPERS. I'M HAPPY TO GO THROUGH THOSE ALL. IF YOU'D LIKE, I
24 COULD LIST THEM OR IF YOU PREFER, WE COULD REFER TO THE
25 VERSION OF THE DOCUMENT REQUEST AND DEPOSITION REQUEST IN THE
26 EX PARTE APPLICATION, YOUR HONOR.

1 THE COURT: WHO DO YOU PLAN ON DEPOSING IN THIS
2 CASE? ASSUMING, OF COURSE, THAT I REOPEN DISCOVERY FOR THE
3 EXPRESSED PURPOSE OF LIMITED DISCOVERY AS TO WHO IS
4 RESPONSIBLE FOR WHAT HAPPENED.

5 MS. MEHTA: CORRECT, YOUR HONOR. SO IF WE ARE GOING
6 TO REOPEN DISCOVERY NOT AS TO THE MERITS OF THE CASE BUT AS TO
7 THE QUESTION OF THE BREACH OF THE COURT'S ORDERS, WHICH WE
8 THINK IS APPROPRIATE AND WE'RE REQUESTING. WHAT WE WOULD LIKE
9 FIRST IS DOCUMENT DISCOVERY AND FORENSIC INSPECTION OF
10 MR. KRAMER AND HIS COUNSEL'S LAPTOPS AND THE THUMB-DRIVE, IF
11 IT'S STILL IN HIS POSSESSION.

12 ONCE WE HAVE THE FORENSIC IMAGES OF ALL OF THOSE
13 ELECTRONIC REPOSITORIES, WE'D ALSO LIKE IN PARALLEL TO THAT
14 ANY LOGS OR RECORDS ASSOCIATED WITH THE DROPBOX ACCOUNT. AND
15 WE'D LIKE THE FOLLOWING SETS OF THE DOCUMENTARY EVIDENCE
16 RELATING TO THESE EVENTS.

17 SO, FIRST, WE WANT WRITTEN COMMUNICATIONS BETWEEN
18 ANYONE ON THE SIX4THREE SIDE. AND THAT WOULD INCLUDE
19 MR. KRAMER, MR. SCARAMELLINO WHO IS A PART OF THE LEGAL TEAM,
20 MR. GODKIN, MR. KRUZER, MR. GROSS AND ANYONE ELSE ASSOCIATED
21 WITH SIX4THREE. AND ANYONE THAT THEY INTERACTED WITH WITH
22 REGARD TO FACEBOOK'S CONFIDENTIAL INFORMATION.

23 ALL THE EMAILS. ANY WRITTEN COMMUNICATIONS WE'D
24 LIKE. THAT WOULD INCLUDE AT A MINIMUM THE THREE ATTACHMENTS
25 TO MR. KRAMER'S OCTOBER 1ST EMAIL WHICH HAVE BEEN WITHHELD
26 FROM THE COURT AND FROM FACEBOOK. PRESUMABLY THERE ARE OTHER

1 WRITTEN DOCUMENTS THAT WOULD FOLLOW IN THE SCOPE OF THAT THAT
2 WE THINK THE COURT IS ENTITLED TO AS WELL.

3 WE ALSO BELIEVE THAT DOCUMENTS AND PHONE LOGS
4 SHOWING ANY TELEPHONE OR VIDEO CONFERENCE COMMUNICATIONS
5 BETWEEN THE INDIVIDUALS ASSOCIATED WITH SIX4THREE AND THIRD
6 PARTIES WOULD BE APPROPRIATE. BASED ON THE LIMITED WRITTEN
7 RECORD WE HAVE, IT APPEARS THAT THERE WOULD HAVE BEEN
8 TELEPHONE CONVERSATIONS THAT RELATED TO THIS BREACH OF THE
9 COURT'S ORDERS AND TELEPHONE LOGS OR OTHER DOCUMENTS SHOWING
10 THOSE CONVERSATIONS WOULD BE PROBATIVE TO THE COURT'S
11 INVESTIGATION INTO THE VIOLATION OF THE COURT'S ORDER.

12 WE'D ALSO LIKE TO KNOW THAT DOCUMENTS SUFFICIENT TO
13 SHOW ANY OTHER INDIVIDUALS OR ENTITIES TO WHOM SIX4THREE HAS
14 DISCLOSED OR DISCUSSED FACEBOOK'S CONFIDENTIAL INFORMATION.

15 THERE ARE ENOUGH RED FLAGS HERE ON THIS RECORD WITH
16 RESPECT TO THE DISREGARD OF CONFIDENTIALITY OBLIGATIONS THAT
17 WE BELIEVE AND WE EXPECT YOUR HONOR WOULD WANT TO CONFIRM THAT
18 THERE MAY HAVE BEEN OTHER BREACHES OF CONFIDENTIALITY. AND WE
19 NEED TO FIGURE OUT WHAT THOSE WERE AND MAKE SURE THAT WE KNOW
20 THE FULL EXTENT OF THAT SO THAT YOUR HONOR CAN TAKE THE
21 APPROPRIATE MEASURES.

22 BEYOND THAT AND THE DROPBOX, WE'D ALSO LIKE TO ASK
23 FOR YOUR HONOR TO ORDER DEPOSITIONS. AND THE DEPOSITIONS
24 WOULD INCLUDE MR. KRAMER, MR. SCARAMELLINO, MR. GODKIN AND
25 MR. GROSS. DEPENDING ON WHAT WE LEARN THROUGH THE DOCUMENTS
26 AND THROUGH THE DEPOSITIONS, IT'S CONCEIVABLE THAT ADDITIONAL

1 PERSONS MIGHT NEED TO BE SUBJECT TO DEPOSITION. BUT WE KNOW
2 FROM THEIR RECORD THAT THEY HAVE PRESENTED THAT AT LEAST THOSE
3 FOUR INDIVIDUALS WERE ACTIVELY INVOLVED IN THE VIOLATION OF
4 THIS COURT'S ORDER. AND ONLY THEY WILL KNOW THE FACTS AS TO
5 HOW IT CAME ABOUT AND WHO WAS INVOLVED TO WHAT EXTENT.

6 SO THAT WOULD BE THE DISCOVERY THAT WE ARE
7 REQUESTING, YOUR HONOR. AND WE'RE REQUESTING THAT THAT
8 DISCOVERY HAPPEN IMMEDIATELY. AND BY "IMMEDIATELY," WE WOULD
9 RESPECTFULLY SUGGEST, YOUR HONOR, THAT WHEN MR. KRAMER TURNS
10 IN HIS LAPTOP, HE TURNS HIS LAPTOP OVER TONIGHT THAT IT BE
11 TURNED OVER NOT TO MR. GROSS WHO INSTRUCTED MR. KRAMER TO
12 DELETE EVIDENCE JUST LAST WEEK. BUT INSTEAD TO A FORENSIC
13 RECOVERY FIRM THAT CAN TAKE POSSESSION OF MR. KRAMER'S LAPTOP,
14 THE LAPTOP OF COUNSEL, THE THUMB-DRIVE AND ANY OTHER
15 ELECTRONIC SYSTEMS THAT WERE INVOLVED IN THIS AND CAN START
16 THE PROCESS OF A FORENSIC RECOVERY SO THAT WE CAN TRY TO
17 DETERMINE WHAT EVIDENCE THERE IS THAT'S A VIOLATION OF THE
18 COURT'S ORDER. RATHER THAN ALLOW FACEBOOK CONFIDENTIAL
19 INFORMATION TO REMAIN IN THE POSSESSION OF INDIVIDUALS WHO
20 HAVE ALREADY SHOWN A DISREGARD FOR THIS COURT'S ORDER AND
21 THEIR OBLIGATION UNDER THE COURT'S ORDERS.

22 THAT'S ONE THING THAT WE NEED IMMEDIATELY. THE
23 OTHER THING THAT WE NEED IMMEDIATELY IS ALL OF THE DOCUMENTS
24 TO BE PRODUCED AND FOR THE DEPOSITIONS TO PROCEED PROMPTLY.
25 AND BY "PROMPTLY" WE MEAN IN THE NEXT WEEK. AND THE REASON
26 FOR THAT IS, FIRST, THAT SIX4THREE AND ITS COUNSEL HAVE

1 ALREADY ADMITTED TO TAKING STEPS TO TRY TO DESTROY EVIDENCE OF
2 THE BREACH ITSELF THROUGH THEIR INSTRUCTION TO THEIR CLIENT TO
3 DELETE FROM THE LAPTOP RECORDS THAT MIGHT SHOW WHAT DOCUMENTS
4 WERE PROVIDED TO PARLIAMENT TO THE DCMS COMMITTEE.

5 SECONDLY, MR. KRAMER ALREADY CLAIMS THAT HE CAN'T
6 REMEMBER THINGS THAT HAPPENED JUST LAST WEEK. WITH EVERY
7 PASSING DAY, WE RISK FURTHER CLAIMS OR SUGGESTIONS THAT THE
8 PEOPLE THAT WOULD KNOW WHAT HAPPENED HERE NOW CAN'T REMEMBER
9 WHAT HAPPENED. AND THE FURTHER CLAIMS OF LOSS OF MEMORY
10 PREJUDICE THIS COURT'S ABILITY TO GET TO THE BOTTOM OF WHAT
11 HAS HAPPENED HERE.

12 AND, FINALLY, BECAUSE SIX4THREE AND ITS COUNSEL HAVE
13 SHOWN A CAVALIER DISREGARD FOR THE COURT'S ORDERS AND THE
14 CONFIDENTIALITY OBLIGATIONS THEY HAVE AS LITIGANTS AND MEMBERS
15 OF THE BAR, EVERY DAY EVERY MOMENT THAT THEY CONTINUE TO
16 POSSESS FACEBOOK CONFIDENTIAL INFORMATION, THERE IS A
17 HEIGHTENED RISK THAT WE WILL CONTINUE TO HAVE SUCH BREACHES.

18 SO WHAT WE WOULD PROPOSE, YOUR HONOR, IS THAT WE
19 IMMEDIATELY MEANING BY 5:00 O'CLOCK ON FRIDAY GET ALL OF THE
20 DOCUMENTS THAT WE HAVE REQUESTED WHICH SHOULD ALLOW THE COURT
21 TO GET TO THE BOTTOM OF WHAT HAD HAPPENED HERE. DEPOSITIONS,
22 WE'RE READY TO GO AS SOON AS THOSE DOCUMENTS ARE PRODUCED.
23 TUESDAY, WEDNESDAY NEXT WEEK WE'RE READY TO TAKE THOSE
24 DEPOSITIONS.

25 AND THEN WE WOULD ASK THAT IMMEDIATELY AFTER THE
26 DEPOSITIONS, WE SET A BRIEFING SCHEDULE FOR EXPEDITED BRIEFING

1 ON THE IMPLICATIONS OF WHAT WE LEARN IN DISCOVERY. THAT WOULD
2 INCLUDE BRIEFING ON THE EXTENT OF THE VIOLATION OF THE COURT'S
3 ORDER. THE EXTENT OF EXFOLIATION OF EVIDENCE. WHO WAS
4 INVOLVED, TO WHAT EXTENT AND WHAT THE APPROPRIATE REMEDIES
5 SHOULD BE INCLUDING, FOR EXAMPLE, TERMINATING IN MONETARY
6 SANCTIONS AND POTENTIALLY WHETHER CONTEMPT PROCEEDINGS SHOULD
7 BE INITIATED AT THAT POINT.

8 BUT THE BRIEFING SCHEDULE WOULD ALLOW US TO SHARE
9 WITH THE COURT EVERYTHING THAT WE LEARNED THROUGH DISCOVERY
10 AND THEN WHAT WE THINK POTENTIAL REMEDIES MIGHT BE SO YOUR
11 HONOR COULD CONSIDER THOSE AND TAKE THE APPROPRIATE STEPS.
12 THANK YOU, YOUR HONOR.

13 THE COURT: THANK YOU, MS. MEHTA. NOW, COUNSEL FOR
14 PLAINTIFF, MR. GODKIN, YOU MAY BEGIN YOUR ARGUMENTS. BUT
15 BEFORE YOU PRESENT YOUR ARGUMENT, MR. GODKIN, YOU SUBMITTED A
16 THREE-PAGE LETTER THAT'S DATED NOVEMBER 29TH, 2016, THAT'S
17 THREE PAGES IN LENGTH. AND I HAVE A FEW QUESTIONS WITH REGARD
18 TO THAT LETTER. ALL RIGHT.

19 MR. GODKIN: YES, YOUR HONOR.

20 THE COURT: ALL RIGHT. FIRST, WHY WAS THE DROPBOX
21 FOLDER CREATED?

22 MR. GODKIN: YOUR HONOR, IT IS MY UNDERSTANDING THAT
23 SIX4THREE MAINTAINS ITS CORPORATE RECORDS ON THIS DROPBOX
24 ACCOUNT. THE -- WE HAVE NOT ACCESSED THE DROPBOX ACCOUNT.

25 THE COURT: WHO ARE "WE"?

26 MR. GODKIN: ME, MY LAW FIRM. I BELIEVE MR. GROSS

1 HAS ACCESSED IT ONE TIME FOR THE PURPOSE OF TRYING TO ASSESS
2 WHAT HAD HAPPENED HERE. THE DROPBOX FOLDER IN QUESTION, IT IS
3 MY UNDERSTANDING THAT -- AND THIS IS WHAT WE LEARNED FOR THE
4 FIRST TIME LAST WEEK ON MONDAY OR TUESDAY THAT MR. KRAMER HAD
5 ACCESS TO IT.

6 YOUR HONOR, I WOULD LIKE TO BE -- I COMPLETELY AGREE
7 WITH YOUR HONOR THAT THIS IS AN EXTRAORDINARILY SERIOUS
8 MATTER. AND TO THE EXTENT THAT YOUR ORDER STATED THAT COUNSEL
9 INSTRUCTED MR. KRAMER TO DESTROY EVIDENCE, I WANT TO BE CLEAR
10 THAT IT WAS NOT OUR INTENT THAT HE DESTROY ANY EVIDENCE. AND,
11 IN FACT, IT'S OUR BELIEF THAT NO EVIDENCE WAS DESTROYED.

12 OUR REACTIONS TO THIS SITUATION BEGINNING LAST WEEK
13 AS SOON AS WE LEARNED OF IT WAS, FIRST, WHEN WE LEARNED THAT
14 MR. KRAMER WAS IN LONDON ON MONDAY, I BELIEVE, THE 19TH AND WE
15 LEARNED THAT INFORMATION WAS AVAILABLE TO HIM THAT WAS NOT
16 SUPPOSED TO BE AVAILABLE TO HIM, WE IMMEDIATELY TOOK STEPS TO
17 ATTEMPT TO PREVENT THE INAPPROPRIATE DISCLOSURE OF ANY OF THAT
18 INFORMATION TO PARLIAMENT OR ANYONE ELSE.

19 MS. MEHTA: YOUR HONOR, I REALLY APOLOGIZE FOR
20 INTERRUPTING. BUT AT THIS POINT MR. GODKIN IS TESTIFYING AS A
21 PERCIPIENT WITNESS AS OPPOSED TO PRESENTING ARGUMENT. AND HE
22 SHOULD BE SWORN IN AND SUBJECT TO CROSS-EXAMINATION.

23 THE COURT: I THINK SO TOO.

24 MR. GODKIN: YOUR HONOR, I WAS TRYING TO ANSWER YOUR
25 QUESTION.

26 THE COURT: WELL, AGAIN, THERE ARE A COUPLE OF

1 PROCEDURAL ISSUES THAT WE HAVE. FIRST OF ALL, I HAVE SOME
2 QUESTIONS THAT I WANT TO HAVE ANSWERED REGARDING THE DROPBOX
3 BECAUSE SHOULDN'T THE FOLDER DROPBOX FOLDER REALLY BE ON
4 COUNSEL'S DROPBOX? SHOULDN'T COUNSEL HAVE THEIR OWN DROPBOX
5 AND NOT THE PRINCIPAL PLAINTIFF IN THE CASE?

6 MR. GODKIN: YES, I AGREE WITH YOU, YOUR HONOR.

7 THE COURT: WHY WASN'T THAT DONE?

8 MR. GODKIN: IT HAS BEEN DONE, YOUR HONOR.

9 THE COURT: FIRST OF ALL, YOU HAVE DOCUMENTS THAT
10 WERE FOR ATTORNEY'S EYES ONLY PURSUANT TO THE CONFIDENTIALITY
11 AGREEMENT, THE PROTECTIVE ORDER THAT WAS ISSUED BACK IN 2016,
12 CORRECT?

13 MR. GODKIN: YES, YOUR HONOR.

14 THE COURT: AND BY DESIGN, THE PRINCIPAL WOULD NOT
15 HAVE ACCESS TO THOSE DOCUMENTS.

16 MR. GODKIN: AND, YOUR HONOR, IT'S MY UNDERSTANDING
17 THAT HE DID NOT HAVE ACCESS TO THE FOLDERS ON WHICH THOSE
18 HIGHLY CONFIDENTIAL DOCUMENTS WERE PLACED.

19 THE COURT: WELL, I'M TRYING TO UNDERSTAND HOW
20 FUNDAMENTALLY IF THAT PROTECTIVE ORDER LIMITS THE
21 ACCESSIBILITY TO THOSE DOCUMENTS TO COUNSEL ESSENTIALLY FOR
22 COUNSEL'S EYES ONLY. AND THAT MR. KRAMER WOULD ONLY BE PRIVY
23 TO THOSE DOCUMENTS IN THE EVENT THAT THERE WAS SOMETHING
24 DURING THE COURSE OF THE LAWSUIT THAT WOULD TRIGGER HIS
25 PARTICIPATION OR SOMEHOW REQUIRE HIS REVIEW OF THOSE
26 DOCUMENTS; IS THAT CORRECT?

1 MR. GODKIN: THAT'S CORRECT, YOUR HONOR. BUT IN
2 ADDITION TO COUNSEL, I BELIEVE THE PROTECTIVE ORDER ALLOWS
3 COUNSEL TO ENGAGE CONSULTANTS WHO AGREE TO BE BOUND BY THE
4 TERMS.

5 THE COURT: THAT'S TRUE BUT THAT'S NOT RELEVANT
6 HERE. I READ IT. I AM FULLY AWARE AND WELL VERSED IN WHO IS
7 ALL INVOLVED IN THE PROTECTIVE ORDER. THAT IS TO SAY I
8 UNDERSTAND THAT THERE ARE OTHER INDIVIDUALS IF THEY NEED TO BE
9 CONSULTED THAT WOULD BE BOUND BY THE PROTECTIVE ORDER.

10 SO, COUNSEL, AT ISSUE YOU DIRECTED YOUR LEGAL STAFF
11 TO MOVE ANY FOLDERS THAT CONTAINED HIGHLY CONFIDENTIAL
12 DOCUMENTS FROM SIX4THREE'S DROPBOX ACCOUNT TO MR. GROSS'S
13 FIRM'S CLOUD FILE SYSTEM, CORRECT?

14 MR. GODKIN: YOUR HONOR, AS SOON AS WE LEARNED THAT
15 DOCUMENTS HAD BEEN PLACED ON SIX4THREE'S DROPBOX WHICH WAS --
16 THIS WAS LAST WEEK, WE WERE NOT AWARE THAT THESE -- THESE
17 UNREDACTED BRIEFINGS AND DECLARATIONS AND EXHIBITS AND THE
18 LIKE HAD BEEN MOVED ANYWHERE. AS SOON AS WE LEARNED THAT LAST
19 WEEK, WE TOOK STEPS TO MOVE EVERYTHING ONTO MR. GROSS'S BOX
20 SYSTEM WHICH IS AS I UNDERSTAND IT A SIMILAR TYPE OF SYSTEM TO
21 WHICH ONLY MR. GROSS HAS ACCESS.

22 THE COURT: MR. SCARAMELLINO HAS BEEN INVOLVED IN
23 THIS CASE. IS HE PART OF SIX4THREE'S LEGAL STAFF?

24 MR. GODKIN: HE'S PART OF MY LEGAL TEAM, YOUR HONOR.
25 SIX4THREE DOES NOT HAVE A LEGAL STAFF, BUT HE HAS BEEN PART OF
26 THE LEGAL TEAM. IN FACT, THAT ISSUE WAS RAISED IN FRONT OF

1 JUDGE WEINER. AND SHE APPROVED MR. SCARAMELLINO BEING PART OF
2 THE TEAM GOING FORWARD.

3 THE COURT: SO MR. SCARAMELLINO ACCESSED AND EDITED
4 FILES IN SIX4THREE'S DROPBOX? IS THAT WHAT YOU SAID IN YOUR
5 LETTER?

6 MR. GODKIN: I BELIEVE THAT'S THE CASE, YOUR HONOR.
7 WHAT WE DIDN'T LEARN UNTIL LAST WEEK WAS THAT MR. KRAMER HAD
8 ACCESS TO THOSE FILES. AND THAT IS WHY WE IMMEDIATELY TOOK
9 STEPS TO TRY TO ELIMINATE MR. KRAMER'S ACCESS TO THINGS HE
10 WASN'T ENTITLED TO HAVE ACCESS TO. AGAIN, ALL THIS BEFORE HE
11 TURNED ANYTHING OVER TO PARLIAMENT. I WOULD SAY, YOUR HONOR,
12 ALSO I NEED TO SAY THAT THIS WHOLE SITUATION HAS CREATED
13 SERIOUS ISSUES FOR US UNDER THE RULES OF PROFESSIONAL
14 RESPONSIBILITY AS TO WHETHER WE CAN CONTINUE TO ACT AS COUNSEL
15 FOR SIX4THREE IN THIS MATTER.

16 AND IF WE HAVE CONCLUDED THAT WE CANNOT, WE ARE
17 STILL COUNSEL OF RECORD OF COURSE UNTIL SIX4THREE SHOULD
18 ENGAGE REPLACEMENT COUNSEL. WE HAVE INFORMED THEM OF THAT
19 FACT AND ARE AWAITING INSTRUCTIONS.

20 MR. GROSS: YOUR HONOR, TO BE CLEAR, THAT'S MY FIRM
21 AS WELL.

22 MR. GODKIN: THAT'S BIRNBAUM & GODKIN AND GROSS &
23 KLEIN.

24 THE COURT: MR. GODKIN, YOU REPRESENTED THAT THE
25 FILE TRANSFER TO MR. GROSS'S ACCOUNT OCCURRED FROM
26 NOVEMBER 20TH THROUGH NOVEMBER 27TH; IS THAT CORRECT?

1 MR. GODKIN: THAT'S MY UNDERSTANDING, YOUR HONOR.

2 THE COURT: DURING THIS TIME THAT IS DURING THIS
3 TRANSFER PERIOD, WHAT ACTIONS DID YOU TAKE TO MAKE THE DATA
4 UNAVAILABLE TO SIX4THREE'S DROPBOX, UNAVAILABLE TO MR. KRAMER
5 AS THE ADMINISTRATOR?

6 MR. GODKIN: MAY I ASK MR. GROSS 'CAUSE HE ACTUALLY
7 HANDLED THAT TO RESPOND TO THAT QUESTION?

8 MR. GROSS: I'M HAPPY TO RESPOND, YOUR HONOR.
9 THE -- SO I GOT -- WHILE THIS WAS OCCURRING, ONE OF THE THINGS
10 THAT I DID WAS GO TO MR. KRAMER AND GET THE PASSWORD TO THAT
11 DROPBOX AND LOOK TO SEE IN THAT DROPBOX WHAT ITS SITUATION
12 WAS. WHAT IT APPEARS TO BE I DID NOT WANT TO MODIFY ANYTHING
13 IN THAT DROPBOX THAT APPEARS TO BE THAT A NUMBER OF FILES HAD
14 BEEN MARKED AND FOLDERS HAD BEEN MARKED FOR DELETION. NOW,
15 I -- I DIDN'T WANT TO DO ANY CHANGES WHATSOEVER.

16 BUT -- SO I GAVE INSTRUCTIONS. WITHOUT WAIVING
17 PRIVILEGE, THERE'S INSTRUCTIONS WERE MADE TO RESTRICT ACCESS.
18 MY DESIRE WAS TO TAKE CONTROL OF THE DROPBOX ACCOUNT, BUT I
19 DID NOT WANT TO ROUGH FOUL OF THE COURT'S ORDER CONCERNING
20 MODIFICATIONS. THE DOCUMENTS IN QUESTION DURING THE TRANSFER
21 WERE IN POSSESSION OF MR. SCARAMELLINO. THEY WERE ON HIS
22 LOCAL MACHINE. AND HE WAS IN CHARGE OF DOING THE UPLOADING TO
23 MY SYSTEM.

24 THE COURT: OKAY.

25 MR. GROSS: AND IN TERMS OF HIS -- MR. KRAMER COULD
26 NOT GET ACCESS TO MY SYSTEM BECAUSE HE IS NOT INVITED TO THAT,

1 AND YOU HAVE TO BE INVITED TO THAT LOCATION TO ACCESS IT.

2 THE COURT: MR. GROSS, YOU SAID IN YOUR DECLARATION
3 EXECUTED ON NOVEMBER 26, 2018, AT PARAGRAPH 11 THAT YOU TOOK
4 FURTHER ACTIONS TO ENSURE THAT QUOTE "THE AFOREMENTIONED
5 FOLDER WAS IN FACT" -- "WAS DELETED FROM SIX4THREE'S DROPBOX"
6 CLOSE QUOTE WHEN MR. GODKIN STATES THAT THE DATA TRANSFER WAS
7 NOT COMPLETED UNTIL NOVEMBER 27TH SET FORTH IN THE FOOTNOTE
8 NUMBER 3 OF PAGE 2 OF MR. GODKIN'S LETTER DATED NOVEMBER 29TH,
9 2018. SO IS THAT CORRECT?

10 MR. GROSS: YEAH, I WAS GOING TO CLARIFY. I
11 APOLOGIZE FOR TALKING OVER YOU.

12 THE COURT: WHAT ACTIONS DID YOU TAKE TO DELETE THE
13 LOCAL FILES FROM MR. KRAMER'S LAPTOP?

14 MR. GROSS: I DID NOT PERSONALLY TAKE THOSE ACTIONS.
15 BUT TO BE CLEAR, THE -- THERE WERE DOCUMENTS THAT WERE ON THE
16 DROPBOX THAT WE LEARNED PRIOR TO HIS DISCLOSURE TO PARLIAMENT.
17 SO PRIOR TO HIS DISCLOSURE TO PARLIAMENT, WE LEARNED THAT
18 THERE WERE DOCUMENTS ON AN ACCOUNT THAT HE COULD HAVE ACCESS
19 TO. SO OUR IMMEDIATE IMPULSE AND BOOM BOOM WAS TO BRING HIM
20 INTO COMPLIANCE WITH THE COURT'S PROTECTIVE ORDER. SO THE
21 INSTRUCTIONS WERE TO -- THE EFFORTS WERE TO GET THOSE
22 DOCUMENTS ONTO A LOCAL MACHINE BECAUSE THOSE TWO PROGRAMS DO
23 NOT TALK TO EACH OTHER.

24 SO GET THOSE -- WHAT I MEAN BY THAT, YOUR HONOR, IS
25 THERE'S NOT AN EASY AUTOMATED WAY TO SAY "FLIP SWITCH.
26 TRANSFER FROM ONE SYSTEM TO THE OTHER." SO THEY NEED TO GET

1 DOWNLOADED ONTO MR. SCARAMELLINO'S MACHINE AND THEN ONTO MY
2 SYSTEM.

3 THE COURT: I HATE TO BE REDUNDANT IN MY QUESTIONS.
4 I WANT TO RETURN TO THE FUNDAMENTAL QUESTION THAT I ASKED AT
5 THE BEGINNING OF THESE QUESTIONS TO THE PLAINTIFF'S COUNSEL
6 WHICH IS IF WE HAVE A PROTECTIVE ORDER THAT'S BEEN IN PLACE
7 FOR TWO YEARS AND IF THOSE DOCUMENTS ARE FOR THE ATTORNEY'S
8 EYES ONLY, HOW DID A PARTY THAT WAS NOT SUPPOSED TO BE PRIVY
9 TO THOSE DOCUMENTS COME INTO POSSESSION OF THOSE DOCUMENTS
10 THAT PARTY BEING THE PLAINTIFF'S PRINCIPAL MR. KRAMER?

11 MR. GROSS: I DON'T HAVE PERSONAL KNOWLEDGE ABOUT
12 THAT, YOUR HONOR. I -- I WAS INVOLVED --

13 THE COURT: HOW CAN YOU NOT HAVE PERSONAL KNOWLEDGE
14 OF THAT OR HOW CAN THE FIRM NOT HAVE PERSONAL KNOWLEDGE WHEN
15 YOU'RE CHARGED WITH THE RESPONSIBILITY OF PROTECTING THOSE
16 DOCUMENTS?

17 MR. GROSS: I UNDERSTAND, YOUR HONOR. I CAME ON AS
18 LOCAL COUNSEL IN APRIL OR MAY OF THIS YEAR, AND SO I HAVE
19 LIMITED KNOWLEDGE. AND I DON'T MEAN -- I'M JUST TRYING TO
20 MAKE CLEAR THE ONLY -- THE FIRST TIME I EVER HEARD OF THAT
21 ACCESS ISSUE WAS NOVEMBER 20TH. AND MY IMMEDIATE AND SOLE
22 GOAL WAS TO CURE THAT.

23 THE COURT: ALL RIGHT. MR. GODKIN, I HAVE THE SAME
24 QUESTION FOR YOU. WE WERE TALKING ABOUT THAT EARLIER. YOU
25 NEVER REALLY ANSWERED THE QUESTION. SO SPECIFICALLY IF YOUR
26 FIRM IS REPRESENTING SIX4THREE AND YOUR FIRM AND OTHERS SET

1 FORTH IN THAT PROTECTIVE ORDER ARE CHARGED WITH RESPONSIBILITY
2 OF PROTECTING THOSE CONFIDENTIAL DOCUMENTS AND THERE ARE ONLY
3 LIMITED CIRCUMSTANCES WHEREBY MR. KRAMER WOULD COME INTO
4 POSSESSION OF THOSE DOCUMENTS OR ALTERNATIVELY VIEW THOSE
5 DOCUMENTS, HOW DID HE BECOME IN POSSESSION OF THOSE DOCUMENTS?

6 MR. GODKIN: YOUR HONOR, WHAT I LEARNED LAST WEEK
7 FOR THE FIRST TIME WAS THAT THE DOCUMENTS WOULD HAVE BEEN
8 PLACED ON SIX4THREE'S DROPBOX SYSTEM.

9 THE COURT: HOW?

10 MR. GODKIN: I DON'T KNOW.

11 THE COURT: WHY?

12 MR. GODKIN: I DON'T KNOW THAT EITHER. BUT THAT IS
13 PRECISELY THE PROBLEM HERE THAT HAS CAUSED US TO HAVE A
14 SERIOUS ISSUE. YOU'RE ABSOLUTELY RIGHT THAT THE -- THE
15 DOCUMENTS THAT WERE PRODUCED BY FACEBOOK IN MY UNDERSTANDING
16 HAVE ALWAYS BEEN COMPLETELY SECURE FROM MR. KRAMER. THE
17 MISTAKE THAT WAS MADE HERE WAS THAT PLEADINGS THAT REFERENCED
18 THOSE DOCUMENTS HAD BEEN PLACED WITHOUT MY FIRM'S KNOWLEDGE
19 ONTO SIX4THREE'S DROPBOX SYSTEM. THAT IS I BELIEVE WHERE THE
20 MISTAKE WAS MADE. AND MY FIRM OBVIOUSLY HAS TO TAKE
21 RESPONSIBILITY FOR FAILING TO ADEQUATELY PROTECT THAT FROM
22 HAPPENING AND WE DO.

23 THAT I BELIEVE IS WHAT HAPPENED. WE DIDN'T LEARN OF
24 IT UNTIL LAST WEEK. AND AS SOON AS WE LEARNED OF IT, WE
25 IMMEDIATELY TRIED TO TAKE STEPS TO FIX IT. BUT I DO WANT TO
26 STRESS, YOUR HONOR, THAT WE WERE -- WE WERE IN NO WAY

1 INTENDING TO DESTROY EVIDENCE. WHAT WE WERE INTENDING TO DO
2 IS CORRECT A PROBLEM THAT WE DISCOVERED THAT WAS SERIOUS.

3 THE COURT: WOULDN'T IT BE INTERESTING TO FIND OUT
4 WHAT EXACTLY WAS TRANSMITTED TO THE DCMS FROM MR. KRAMER'S
5 COMPUTER OR FROM THE DROPBOX SUCH THAT IT COULD BE
6 RECONSTRUCTED FOR YOUR PURPOSES?

7 MR. GODKIN: YES, YOUR HONOR. AND I THINK TO THE
8 EXTENT THAT CAN BE DETERMINED IF MR. KRAMER CAN'T SHED LIGHT
9 ON THAT, PERHAPS HIS LAPTOP CAN AND PERHAPS THE DROPBOX FOLDER
10 CAN. SO MY SUGGESTION IS THAT IN ADDITION TO THE LAPTOP, THAT
11 STEPS BE TAKEN IMMEDIATELY TO MAKE SURE THAT NO ONE HAS ACCESS
12 TO THE DROPBOX SYSTEM FOLDER ANY LONGER. THE PASSWORD NEEDS
13 TO BE CHANGED, I BELIEVE.

14 THE COURT: WHY WAS MR. SCARAMELLINO UPLOADING
15 DOCUMENTS ON SIX4THREE'S DROPBOX? HE'S PART OF YOUR LEGAL
16 STAFF, CORRECT?

17 MR. GODKIN: HE'S PART OF THE LEGAL TEAM AND I DON'T
18 KNOW THE ANSWER. HE SHOULD NOT HAVE DONE THAT. HE HAD COPIES
19 OF DOCUMENTS THAT HE WAS WORKING WITH. IT WAS NOT MY
20 UNDERSTANDING THAT HE WAS PUTTING THEM ON A SIX4THREE SYSTEM
21 THAT MR. KRAMER HAD ACCESS TO.

22 THE COURT: WAS HE AWARE OF THE PROTECTIVE ORDER?

23 MR. GODKIN: ABSOLUTELY, YOUR HONOR.

24 THE COURT: I REFER YOU TO PAGE 2, FOOTNOTE 4 OF
25 YOUR LETTER DATED NOVEMBER 29, 2018. WHEN DID YOU LEARN
26 DROPBOX'S SYNCHING CAPABILITY?

1 MR. GODKIN: JUST LAST WEEK, YOUR HONOR. AND THAT'S
2 WHEN WE LEARNED THAT MR. KRAMER HAD A LOCAL COPY OF DOCUMENTS
3 ON HIS LAPTOP. AND THAT'S WHY WE WERE CONCERNED THAT IF HE
4 STILL HAD A LOCAL COPY OF DOCUMENTS ON HIS LAPTOP THAT HE WAS
5 NOT ENTITLED TO HAVE ACCESS TO, THAT HE SHOULD NO LONGER HAVE
6 ACCESS TO THEM.

7 IT'S OUR UNDERSTANDING THAT IT'S A LOCAL COPY
8 MEANING THAT THE -- THERE IS AN EXACT COPY OF THOSE DOCUMENTS
9 THAT IS NOW HOUSED ON MR. GROSS'S BOX SYSTEM. AND ALL WE DID
10 WAS WE ASKED MR. KRAMER TO DELETE THE LOCAL COPY WHICH WAS NOT
11 A DELETION OF EVIDENCE BECAUSE THE FILES THAT WERE THERE ARE
12 STILL AVAILABLE. TO THE EXTENT IT'S POSSIBLE AND I DON'T KNOW
13 THE ANSWER TO THIS, IT'S A TECHNICAL MATTER. BUT TO THE
14 EXTENT IT'S POSSIBLE TO DETERMINE WHAT HE COPIED FROM HIS
15 LAPTOP ONTO A THUMB-DRIVE, I BELIEVE THAT THOSE -- THAT
16 POSSIBLY CAN BE DETERMINED FROM SYSTEM DATA IN THE COMPUTER
17 ITSELF AS OPPOSED TO WHAT'S ON THE LAPTOP.

18 AND THEN THE OTHER THING WE COULD DO, YOUR HONOR, IS
19 WE COULD -- WE COULD ATTEMPT TO GET BACK FROM OR AT LEAST
20 COPIES FROM DCMS. AS YOU KNOW, WE ASKED FOR THEM TO BE
21 RETURNED BUT THEY REFUSED.

22 THE COURT: SO, AGAIN, HOW DID YOU LEARN ABOUT THIS
23 CAPABILITY?

24 MR. GODKIN: WHEN WE WERE INVESTIGATING LAST WEEK
25 WHEN WE LEARNED OF THIS PROBLEM.

26 MR. GROSS: YOUR HONOR, IF I CAN CLARIFY SLIGHTLY?

1 THE COURT: YES.

2 MR. GROSS: I KNOW THAT DROPBOX HAS THAT CAPABILITY.
3 THE QUESTION WHAT WE DIDN'T KNOW AN ENTERPRISE ACCOUNT IS
4 WHAT -- WE DID NOT UNDERSTAND WAS THAT MR. KRAMER HAD THE
5 SETTING SUCH THAT IT WAS BEING POPULATED ON HIS COMPUTER. SO
6 TO BE CLEAR SO THERE'S NO MISUNDERSTANDING, I UNDERSTAND THAT
7 IT HAS A SYNCHING CAPABILITY. I DID NOT KNOW THAT THAT
8 SYNCHING CAPABILITY HAD BEEN ACTIVATED FOR MR. KRAMER AS TO
9 THE DOCUMENTS IN QUESTION. AND THAT'S WHAT WE LEARNED ON THE
10 23RD WHEN WE LEARNED THAT THE DISCLOSURE HAD OCCURRED.

11 THE COURT: WHO DECIDED MR. KRAMER HAD THE AUTOMATIC
12 SYNCHING CAPABILITY ENABLED?

13 MR. GROSS: I DON'T KNOW.

14 THE COURT: AND WHO BESIDES --

15 MR. GODKIN: I'M SORRY. I DON'T KNOW EITHER, YOUR
16 HONOR.

17 THE COURT: THANK YOU. SO WHO BESIDES MR. KRAMER
18 AND MR. SCARAMELLINO HAD ACCESS TO THE DROPBOX?

19 MR. GODKIN: I DON'T KNOW. I DON'T BELIEVE ANYBODY,
20 BUT I DON'T KNOW.

21 THE COURT: ON THE THIRD FULL PARAGRAPH OF YOUR
22 LETTER DATED NOVEMBER 29TH, YOU STATE AND I QUOTE, "WE ALSO
23 UNDERSTOOD THAT A LOCAL COPY OF ALL THE FILES WAS LOCATED ON
24 MR. SCARAMELLINO'S COMPUTER WHICH WAS IDENTICAL TO THE FILES
25 THAT HAD BEEN ON MR. KRAMER'S COMPUTER."

26 WHAT FORMS THE BASIS FOR THAT DECLARATIVE STATEMENT

1 IN YOUR LETTER?

2 MR. GROSS: MR. SCARAMELLINO WAS INSTRUCTED TO
3 EFFECT THE TRANSFER OF FILES FROM THE DROPBOX ACCOUNT, SO OUR
4 KNOWLEDGE IS BASED ON CONVERSATIONS WITH MR. SCARAMELLINO. SO
5 WE UNDERSTOOD THAT THE METHOD THAT HE WAS TAKING WAS, AS I HAD
6 MENTIONED BEFORE, TO PULL THE DOCUMENTS FROM THE DROPBOX
7 ACCOUNT TO HIS MACHINE. AND THEN FROM HIS MACHINE UP TO THE
8 LOCATION ON MY SYSTEM, YOUR HONOR.

9 THE COURT: OKAY. ON PAGE 3 OF YOUR LETTER,
10 MR. GODKIN. THE FIRST FULL PARAGRAPH YOU STATE, "WE DO NOT
11 HAVE THE TECHNICAL EXPERTISE TO STATE FOR SURE. HOWEVER, IT
12 DOES NOT APPEAR THAT MR. KRAMER'S DELETION OF LOCAL COPIES OF
13 THE DOCUMENTS FROM HIS COMPUTER WOULD AFFECT ANY ELECTRONIC
14 EVIDENCE OF HIS PROVISION OF DOCUMENTS, IF ANY EXISTED.
15 PERIOD. IT APPEARS THAT THIS INFORMATION IF IT EXISTED WOULD
16 BE CONTAINED IN THE SYSTEM LOG OF HIS LAPTOP." PERIOD AND
17 CLOSE QUOTE.

18 WHAT FORMS THE BASIS OF THAT DECLARATIVE STATEMENT,
19 SIR?

20 MR. GODKIN: THAT IS AGAIN FOR MR. GROSS.

21 MR. GROSS: I WILL SPEAK TO THAT, YOUR HONOR.

22 THE COURT: THANK YOU.

23 MR. GROSS: WHEN THIS SITUATION IN PREPARATION FOR
24 THIS SITUATION, I WAS TRYING TO FIGURE OUT. AND MY GOAL HERE
25 IS TO TRY TO GET EVERY -- MAKE THESE THINGS AS CLEAR AS
26 POSSIBLE, BUT I AM NOT A TECHNICAL EXPERT. BUT MY RESEARCH

1 INDICATES THAT WHEN WHAT YOU'RE TRYING TO FIGURE OUT IS
2 WHETHER A DOCUMENT WAS TRANSFERRED FROM AN INTERNAL LOCATION A
3 LOCAL LOCATION ON A PC TO A THUMB-DRIVE, THAT THAT METADATA,
4 IF YOU WILL, THAT IS IF IT EXISTS WOULD EXIST IN THE SYSTEM'S
5 LOG. THAT IT DOESN'T ACTUALLY GET ATTACHED TO ANY INDIVIDUAL
6 FILE BECAUSE IT IS AN OPERATION OF THE SYSTEM THAT'S DOING
7 THAT. SO THAT'S MY UNDERSTANDING IS THAT IF YOU ARE --

8 IN ORDER TO DO IT IN AN ELECTRONIC FORENSIC WAY TO
9 DETERMINE WHERE WERE -- WERE DOCUMENTS MOVED FROM A LOCATION
10 ON A COMPUTER TO A THUMB-DRIVE? THAT WOULD BE SYSTEMS
11 INFORMATION. IT WOULDN'T BE INFORMATION THAT IS ASSOCIATED
12 WITH ANY PARTICULAR FILE. SO IF THAT FILE NO LONGER WAS
13 THERE, THAT WOULDN'T AFFECT THAT EVIDENCE BECAUSE THAT FILE
14 SIMPLY DOESN'T -- THAT IS NOT RECORDED ON THE METADATA OF THAT
15 FILE. NOW TO BE CLEAR, YOUR HONOR, I'M NOT A FORENSIC EXPERT.
16 SO THIS IS HOW I UNDERSTAND THINGS.

17 THE COURT: MR. GODKIN, YOUR LETTER ON PAGE 3 YOU
18 STATE THAT YOU RECENTLY REVIEWED THE CONTENTS OF THE SIX4THREE
19 DROPBOX ACCOUNT. WHEN DID YOU REVIEW THE CONTENTS OF THIS
20 DROPBOX ACCOUNT?

21 MR. GODKIN: I DID NOT REVIEW IT, YOUR HONOR. I
22 BELIEVE MR. GROSS DID.

23 MR. GROSS: THIS LETTER WAS -- IT WAS SUPPOSED TO BE
24 ALL OF US.

25 THE COURT: A COLLABORATIVE EFFORT?

26 MR. GODKIN: IT WAS A COLLABORATIVE EFFORT, YEAH.

1 WE WANTED TO GET YOUR HONOR THE INFORMATION WE HAD IN ADVANCE
2 OF THE HEARING.

3 THE COURT: ALL RIGHT.

4 MR. GROSS: WE --

5 THE COURT: MR. GROSS, CAN YOU ANSWER THE QUESTION?

6 MR. GROSS: ABSOLUTELY. YES. SO THAT WOULD HAVE
7 BEEN -- I BELIEVE IT WAS TWO DAYS AGO. I ASKED -- I RECEIVED
8 THE PASSWORD AND LOGGED ON TO THE MACHINE -- I'M SORRY -- TO
9 THE DROPBOX ACCOUNT TO DETERMINE WHETHER DOCUMENTS STILL
10 EXISTED THERE OR IN FACT HAD BEEN COMPLETELY DELETED.

11 THE COURT: OKAY. ON PAGE 3 OF THIS LETTER, YOU
12 STATE QUOTE, "IT APPEARS THAT THE DOCUMENTS IN QUESTION HAVE
13 NOT IN FACT BEEN DELETED. PERIOD. THERE ARE A NUMBER OF
14 FOLDERS THAT HAVE BEEN MARKED FOR DELETION, BUT THEY MAY --
15 BUT THEY HAVE NOT ACTUALLY BEEN DELETED." PERIOD. CLOSE
16 QUOTE. WHAT DOES THIS MEAN?

17 MR. GROSS: YEAH. I'LL EXPLAIN THAT, YOUR HONOR.
18 ON THESE SYSTEMS, IT'S SIMILAR. MAYBE ONE WAY TO LOOK AT IT
19 IS LIKE A TRASH CAN. SO WHEN YOU -- AND I'M SPEAKING HERE AS
20 A GENERAL MATTER AS SOMEONE WHOSE USED THESE SYSTEMS IN THE
21 PAST. WHEN YOU USE THESE SYSTEMS AND YOU DELETE SOMETHING, IT
22 MARKS IT FOR DELETION. AND DEPENDING ON THE SETTINGS OF THE
23 ACCOUNT WHICH IS ONE OF THE -- WELL, DEPENDING ON THE SETTINGS
24 OF THE ACCOUNT, THAT THOSE DOCUMENTS WILL EVENTUALLY BE
25 DELETED PERMANENTLY OR NOT. SO THAT'S ONE OF THE REASONS WHY
26 I THINK SOMETHING THAT WE ARE -- WE VERY MUCH WANT TO RESOLVE

1 AS SOON AS POSSIBLE IS GETTING RID OF SOMEHOW IN A WAY THAT
2 THE COURT IS COMFORTABLE WITH THAT MARKING OF DELETION.

3 SO WHEN I WENT ON TO THE LOCATION WHICH IT'S A PLACE
4 ON THE SYSTEM THAT SHOWS YOU WHAT FILES HAVE BEEN DELETED, IT
5 SHOWS IN FOLDERS A WHOLE NUMBER OF FOLDERS THAT ARE DELETED.
6 AND I --

7 THE COURT: I'M SORRY FOR INTERRUPTING.

8 MR. GROSS: NO, I APOLOGIZE.

9 THE COURT: ARE THERE SETTINGS THAT HAVE TIMING
10 INVOLVED 60 DAYS, 120 DAYS, 6 MONTHS, A YEAR?

11 MR. GROSS: SO BECAUSE I WAS NOT THE ADMINISTRATOR
12 OF THIS ACCOUNT, I DO NOT KNOW THAT. I'VE MADE INQUIRIES AND
13 I DON'T HAVE THAT INFORMATION YET, SO THIS IS SOMETHING
14 THAT -- AND I DID NOT WANT TO MYSELF GIVEN THE COURT'S ORDER
15 DO ANYTHING THAT WOULD MODIFY ANY PORTION OF THIS ACCOUNT.

16 THE COURT: WELL, SOMETHING SHOULD BE DONE TO
17 PRESERVE EVERYTHING FOR THE PURPOSES OF THIS TRIAL OR THIS
18 HEARING. THE DECLARATION THAT YOU FILED SAID THAT THE
19 DOCUMENTS WERE DELETED. SO WHICH IS IT, COUNSEL? EITHER THEY
20 WERE DELETED OR THEY ARE SET FOR DELETION?

21 MR. GROSS: UNDERSTOOD, YOUR HONOR. SO -- AND I
22 THINK IT'S IMPORTANT TO BACK UP. WHAT -- WHAT WE -- AGAIN,
23 OUR INTENTION ON THE 23RD WHEN WE HAD LEARNED THAT MR. KRAMER
24 HAD IN FACT PROVIDED THESE DOCUMENTS AND HE HAD ACCESS TO
25 THESE DOCUMENTS, OUR CHIEF -- SO OUR PREVIOUS INTENTION
26 REMAINED THE SAME WHICH IS WE WANTED TO GET HIM IN COMPLIANCE

1 WITH THE PROTECTIVE ORDER.

2 AND IT WAS -- WE FOUND OUT THAT HE NOT ONLY REMAINED
3 OUT OF COMPLIANCE WITH THAT PROTECTIVE ORDER. BUT HAD IN FACT
4 RELEASED DOCUMENTS IN VIOLATION OF OTHER ORDERS BY THE COURT.
5 SO THE INSTRUCTIONS WERE DELETE EVERYTHING THAT YOU HAVE
6 ACCESS TO. NOW, I -- I FEEL LIKE I WAS IN A SOMEWHAT
7 IMPOSSIBLE SITUATION. I'M NOT ASKING FOR ANYBODY'S SYMPATHY.
8 BUT ON THE ONE HAND I'VE GOT A CONTINUING VIOLATION OF AN
9 ORDER -- OF ORDERS THAT I WANT TO TAKE CARE OF AND RESOLVE.
10 AND THEN ON THE OTHER HAND, WE ARE IN THIS SITUATION.

11 MY PRIMARY THOUGHT IN THIS REGARD WAS I KNOW THERE'S
12 A VIOLATION AND WE NEED TO STOP IT. SO THAT SAID, TO YOUR
13 QUESTION. YOUR QUESTION WAS WHICH ONE IS IT? I WAS NOT
14 INVOLVED IN THE ACTUATION OF THE DELETION. BUT WHAT APPEARS
15 TO HAVE OCCURRED IS THEY WERE DELETED, BUT THEY WEREN'T
16 PERMANENTLY DELETED WHICH IS -- SEEMS TO BE A VERY GOOD THING.
17 SO THAT MARKING FOR DELETION THAT I REFERRED TO, THAT APPEARS
18 TO BE WHAT THE RESULT OF THAT WAS.

19 THE COURT: ALL RIGHT. THOSE WERE THE SEVERAL
20 QUESTIONS THAT WERE FOSTERED BY THIS LETTER. AND I WANTED TO
21 HAVE SOME ANSWERS FROM YOU WITH REGARD TO THOSE, THE ISSUES
22 THAT WERE RAISED BY THE LETTER.

23 MR. GROSS: I'M SORRY, YOUR HONOR.

24 THE COURT: YOU MAY PROCEED.

25 MR. GROSS: SO I WAS GOING TO SAY ONE THING AND I
26 DON'T MEAN TO SPEAK OUT OF TURN. BUT AS TO THIS ISSUE OF

1 UNMARKING THESE FILES FOR DELETION, ONE POSSIBLE THING TO
2 CONSIDER IS AN INDEPENDENT THIRD PARTY COULD DO THAT. SO WE
3 COULD AGREE ON AN INDEPENDENT THIRD PARTY WHO WOULD BE GIVEN
4 ACCESS TO THE ACCOUNT AND COULD UNDELETE THOSE. AND I ONLY
5 BRING THAT UP BECAUSE I SHARE THE COURT'S CONCERN. I'M NOT
6 COMFORTABLE WITH THOSE REMAINING MARKED FOR DELETION. AND I
7 WANTED THAT SUGGESTION TO BE OUT THERE, YOUR HONOR.

8 THE COURT: ALL RIGHT. THANK YOU.

9 MR. GODKIN: YOUR HONOR, MAY I CONTINUE?

10 THE COURT: YES.

11 MR. GODKIN: I WANTED ALSO TO ADDRESS WHAT MS. MEHTA
12 IS ASKING FOR. FIRST OF ALL, AS I THINK, WE ALREADY MADE
13 CLEAR. WE THINK THAT IT IS ENTIRELY APPROPRIATE FOR THE COURT
14 TO ORDER ACTIONS TO BE TAKEN IMMEDIATELY FOR THE PURPOSE OF
15 PRESERVING THE EVIDENCE HERE. AND THAT INCLUDES YOUR ORDER
16 THAT MR. KRAMER TURN OVER HIS LAPTOP. AND YOU SAID YOU WERE
17 INCLINED TO TURN IT OVER TO MR. GROSS.

18 ANOTHER OPTION WOULD BE TO TURN IT OVER TO AN
19 INDEPENDENT FORENSIC PERSON WHO UNDERSTANDS THE TECHNOLOGY WHO
20 MIGHT BE ABLE TO TAKE A LOOK AT IT AND PRESERVE IT AND INFORM
21 ALL OF US WHAT ACTUALLY CAN BE LEARNED FROM IT. WE DON'T --
22 WE DO NOT THINK THAT IT IS APPROPRIATE FOR THAT TO BE TURNED
23 OVER TO FACEBOOK OR FACEBOOK'S COUNSEL AT THIS POINT. RATHER
24 IT'S MORE IMPORTANT TO BE TURNED OVER TO A NEUTRAL PERSON WHO
25 CAN FIGURE OUT EXACTLY WHAT THE FACTS ARE FOR THE COURT AND
26 FOR THE PARTIES SO THAT WE CAN TAKE IT FROM THERE.

1 THE COURT: ALL RIGHT. I THINK TIME IS OF THE
2 ESSENCE. I DON'T THINK THERE'S REAL TIME FOR A THIRD PARTY TO
3 UNMARK FOR DELETION AT THIS POINT.

4 MS. MEHTA: I'M SORRY, YOUR HONOR.

5 MR. GODKIN: THAT'S A DIFFERENT ISSUE. I MEANT THE
6 LAPTOP.

7 THE COURT: OKAY.

8 MR. GODKIN: THE UNMARKING FOR DELETION, I AGREE
9 TIME IS DEFINITELY. THAT WAS WHAT WE ASKED FOR IN THE LETTER
10 IS IMMEDIATELY FOR THE PASSWORD OF THAT ACCOUNT TO BE PROVIDED
11 TO, I THINK, AN INDEPENDENT PERSON IS AGAIN SMART. SO THAT IT
12 CAN BE CHANGED AND IS SAFE. AND, ALSO, IF IN FACT IT TURNS
13 OUT THAT THINGS THAT ARE UNMARKED FOR DELETION CAN BE, THAT
14 CAN BE REVERSED SO THAT NOTHING IS DELETED. I THINK THAT
15 WOULD BE PRUDENT AS WELL.

16 THE COURT: HAVE COUNSEL BEEN IN DISCUSSION THAT IS
17 TO SAY DEFENSE COUNSEL AND PLAINTIFFS WITH REGARD TO HOW TO
18 REMEDY THIS PROBLEM?

19 MS. MEHTA: YOUR HONOR, WE HAVE PROPOSED TWICE TO
20 THEM. FIRST ON MONDAY AND AGAIN ON WEDNESDAY THAT A FORENSIC
21 INSPECTION OCCUR WITH RESPECT TO THE LAPTOP.

22 THE COURT: AND IT SHOULD.

23 MS. MEHTA: AND WE HAVE NOT HEARD ANY RESPONSE FROM
24 THEM. WE HAVE AN INDEPENDENT FORENSIC FIRM STROZ FRIEDBERG
25 THAT IS AT READY TO -- SORRY -- STROZ FRIEDBERG IS READY TO
26 TAKE ON THIS PROJECT AS EARLY AS THIS EVENING. SO RATHER THAN

1 HAVE MR. KRAMER TURN THE LAPTOP OVER TO COUNSEL, WE WOULD
2 PROPOSE THAT MR. KRAMER TURN AND COUNSEL TURN THEIR LAPTOPS
3 OVER TO THIS INDEPENDENT FIRM. AND THE FIRM ALSO BE GIVEN
4 ACCESS TO THE DROPBOX, SO THEY CAN TAKE IMMEDIATE STEPS TO
5 PRESERVE ALL RELEVANT EVIDENCE. AND THIS IS A WELL KNOWN
6 INDEPENDENT FORENSIC FIRM THAT HANDLES THIS SORT OF THING
7 REGULARLY.

8 MR. LERNER: YOUR HONOR, IF I MAY QUICKLY ADD?
9 WHAT'S BEING PROPOSED IN TERMS OF THE NEUTRAL IS WHAT IS
10 PROPOSED WHEN PARTIES COMPLY WITH THE PROTECTIVE ORDER AND
11 PRESERVE EVIDENCE AND FOLLOW THE COURT'S ORDERS, AND THEN THE
12 PARTIES AGREE ON A NEUTRAL. AND BECAUSE THAT PROCESS IS TIME
13 CONSUMING, PEOPLE PLAN AHEAD. THAT IS NOT WHAT HAS HAPPENED
14 HERE. AND THEY ARE TRYING TO ESSENTIALLY SET BACK THE CLOCK
15 AS THOUGH THIS VIOLATION DIDN'T TAKE PLACE.

16 WHAT MS. MEHTA AND I ARE DESCRIBING IS WHAT HAPPENS
17 WHEN YOU BREAK THE RULES WHICH IS THE FORENSIC FIRM WE ARE
18 TALKING ABOUT WILL TAKE AN IMAGE WHICH BY THE WAY, ALL OF THE
19 LAWYERS IN THIS CASE KNOW IS THE WAY YOU DO THIS.

20 WHEN A CLIENT CALLS YOU AND SAYS, "I FOUND
21 INFORMATION THAT I DON'T THINK I'M SUPPOSED TO HAVE," NOBODY
22 IN ANY OF THESE TABLES SAYS "DELETE IT." EVERYBODY SAYS,
23 "TAKE AN IMAGE" BECAUSE OTHERWISE NOBODY IS GOING TO KNOW WHAT
24 HAPPENED.

25 AND THEN AFTER YOU'VE TAKEN THAT IMAGE, YOU CAN
26 CLEAN UP THAT COMPUTER. BUT NOT BEFORE. WHAT THEY'RE

1 PROPOSING TURNS IT ON ITS HEAD, WE WILL HAVE THE FORENSIC FIRM
2 TAKE THE IMAGE TONIGHT. WE'RE PERFECTLY HAPPY TO SAY THAT
3 UNTIL FURTHER INSTRUCTION FROM YOUR HONOR, WE'RE NOT GOING TO
4 LOOK AT IT TONIGHT. BUT OUR FIRM NEEDS TO TAKE THAT IMAGE.
5 THE LETTER THAT YOU JUST READ THROUGH SHOWS ERROR AFTER ERROR
6 AFTER ERROR AS TO HOW TO HANDLE THIS EVIDENCE.

7 AS OF RIGHT NOW WE DON'T KNOW WHAT EXISTS, WHO HAS
8 ACCESS TO IT AND WHERE THIS STUFF IS. AND WHO ELSE PERHAPS,
9 BY THE WAY, IS TRAVELING AROUND WITH THIS STUFF. WE DON'T
10 KNOW ANYTHING. IT NEEDS TO BE HANDLED NOW AND WE CAN DO IT.

11 MR. GODKIN: YOUR HONOR, I DON'T THINK WE HAVE ANY
12 PROBLEM WITH AS LONG AS IT'S AN INDEPENDENT FORENSIC EXPERT.
13 WE DO HAVE A PROBLEM, HOWEVER, HAVING INFORMATION IMMEDIATELY
14 TURNED OVER FACEBOOK BECAUSE THERE VERY WELL MAY BE
15 INFORMATION ON THAT COMPUTER THAT'S PROTECTED BY A PRIVILEGE.

16 IT NEEDS TO BE REVIEWED. THERE ARE A LOT OF
17 POTENTIAL PRIVILEGE ISSUES HERE, YOUR HONOR, WHICH BRINGS ME
18 TO SOME OF THE OTHER REQUESTS THAT FACEBOOK HAS MADE FOR
19 TURNING OVER DOCUMENTS. THEY ARE ESSENTIALLY -- AND I
20 COMPLETELY UNDERSTAND WHY, BUT THEY ARE ESSENTIALLY ATTEMPTING
21 TO BURY US HERE AND DO EVERYTHING SO QUICKLY THAT WE DON'T
22 HAVE TIME TO THINK LET ALONE MAKE SURE IT'S DONE PROPERLY.

23 THE COURT: IF I MAY REMIND YOU, MR. GODKIN, THE
24 COURT WAS BURIED WITH MANY DOCUMENTS BEFORE WITH REGARD TO THE
25 MOTION TO SEAL THAT WE PREPARED FOR ON NOVEMBER 1ST. SEEMS
26 SOMEWHAT IRONIC THAT SUDDENLY WE'RE ALL CONCERNED ABOUT BEING

1 BURIED.

2 MR. GODKIN: YOUR HONOR, WHAT I MEAN BY THAT IS THE
3 REQUEST THAT THEY ARE MAKING CERTAINLY FOR THE LAPTOP, THE
4 DROPBOX AND ALL THAT IS PERFECTLY APPROPRIATE. FOR THE THREE
5 DOCUMENTS THAT WERE ATTACHMENTS TO MR. KRAMER'S EMAIL, THOSE
6 CAN BE PRODUCED PROMPTLY. THAT'S SIMPLE.

7 BUT THE REST OF THEIR REQUESTS ARE IN OUR VIEW
8 OVERLY BROAD. THEY ARE ASKING FOR -- FIRST OF ALL, THERE HAVE
9 BEEN NO COMMUNICATIONS WITH THIRD PARTIES REGARDING FACEBOOK'S
10 CONFIDENTIAL INFORMATION. THAT'S ONE OF THE THINGS THEY ARE
11 ASKING FOR.

12 ONE OF THEIR REQUESTS IS SO BROAD IT LITERALLY
13 COVERS EVERY COMMUNICATION BETWEEN AND AMONG ALL OF THE
14 LAWYERS REPRESENTING THE PLAINTIFF IN THIS CASE WHICH IS --
15 INCLUDES ATTORNEY/CLIENT PRIVILEGE MATERIALS, WORK PRODUCT
16 PRIVILEGE MATERIALS. IT'S A -- NUMBER ONE, AN ENORMOUS AMOUNT
17 OF MATERIAL. BUT, NUMBER TWO, IF THE COURT IS INCLINED TO
18 ORDER PRODUCTION OF DOCUMENTS THAT ARE PRIVILEGED, WE WOULD
19 RESPECTFULLY REQUEST A FULL BRIEFING ON WHETHER OR NOT THAT'S
20 APPROPRIATE. WE BELIEVE IT IS NOT. BUT IF THAT -- IF THE
21 COURT IS INCLINED TO ORDER RELIEF OF THAT BREATH, IT'S AN
22 ISSUE OF SUCH IMPORTANCE THAT WE WOULD -- WE WOULD LIKE AN
23 OPPORTUNITY TO FULLY BRIEF IT BEFORE IT HAPPENS.

24 THE REQUEST FOR IMAGING OF ATTORNEYS' LAPTOPS RAISES
25 ENORMOUS PROBLEMS. FIRST OF ALL, WE ALL HAVE MULTIPLE CLIENTS
26 WHO ARE NOT INVOLVED IN THIS LITIGATION. WE ALL HAVE MULTIPLE

1 PERSONAL MATTERS THAT HAVE NOTHING TO DO WITH THIS LITIGATION.
2 THAT WOULD APPEAR ON COMPUTERS. SO THE REQUEST THAT THEY CAN
3 TAKE ACCESS TO ALL OF OUR COMPUTERS REGARDLESS OF WHETHER THE
4 INFORMATION HAS ANY BEARING ON THIS MATTER AND REGARDLESS OF
5 WHETHER ANYTHING IS PRIVILEGED IS SERIOUSLY OVERBROAD AND
6 RAISES VERY VERY SERIOUS QUESTIONS IF THAT WERE -- IF THE
7 COURT WERE INCLINED TO GRANT RELIEF OF THAT BREATH.

8 DEPOSITIONS OF ATTORNEYS, YOUR HONOR. THAT RAISES
9 ADDITIONAL QUESTIONS. AS I MENTIONED EARLIER, WE HAVE
10 CONCLUDED THAT WE HAVE ETHICAL ISSUES THAT ARE GOING TO
11 PRECLUDE US FROM REMAINING IN THIS CASE. ALSO TO THE EXTENT
12 YOU ARE ORDERING US LAWYERS TO PRODUCE DOCUMENTS AND APPEAR
13 FOR DEPOSITION, WE WOULD WANT FIRST TO ENGAGE OUR OWN COUNSEL
14 TO REPRESENT US WITH RESPECT TO THAT AND TO DO THAT IN AN
15 ORDERLY WAY, IF APPROPRIATE.

16 SO THAT IS ANOTHER -- WE DON'T BELIEVE IT'S
17 APPROPRIATE. WE DON'T THINK ANYTHING WE'VE DONE IS IN
18 DISPUTE. WE'VE JUST BEEN REALLY TRYING TO DO OUR BEST HERE.
19 AND FACEBOOK, YOU KNOW, HAS BEEN VERY AGGRESSIVE FOR
20 UNDERSTANDABLE REASONS. BUT TO GO AFTER US PERSONALLY AS WELL
21 AS MR. KRAMER. BUT ONCE WE START HEADING IN THAT DIRECTION,
22 YOUR HONOR, THE ISSUES ARE VERY VERY SERIOUS AND NEED TO BE --
23 WE BELIEVE NEED TO BE TAKEN SERIOUSLY BEFORE YOU WERE TO ORDER
24 THAT. SO WE WOULD REQUEST A FULL OPPORTUNITY TO BE HEARD ON
25 THAT ISSUE. AND IF YOU'RE INCLINED TO GO THAT WAY, THEN WE
26 WOULD ENGAGE OUR OWN COUNSEL TO REPRESENT US IN THAT REGARD.

1 THE COURT: ISN'T THIS A PROBLEM OF THE PLAINTIFFS
2 OWN MAKING?

3 MR. GODKIN: YOUR HONOR, IT PROBABLY IS. BUT --

4 THE COURT: PROBABLY? YOU EQUIVOCATE?

5 MR. GODKIN: NO, YOUR HONOR. IT'S A PROBLEM OF OUR
6 MAKING. HOWEVER, IT RAISES VERY SERIOUS PROBLEMS THAT WE HAVE
7 TO GRAPPLE WITH. YOU KNOW, THIS WHOLE ISSUE BEGAN LAST
8 MONDAY. WE HAD THE THANKSGIVING HOLIDAY IN THE MIDDLE. AND
9 YOU'VE ORDERED US HERE TODAY AND WE'RE HAPPY TO BE HERE, BUT
10 THIS IS GOING -- ONCE WE PRESERVE THE EVIDENCE WHICH IS
11 CRITICAL, THIS IS GOING TO HAVE TO GET SORTED OUT. AND IT'S
12 GOING TO HAVE TO TAKE LONGER THAN, YOU KNOW, PRODUCING
13 DOCUMENTS TONIGHT AND HAVING DEPOSITIONS NEXT WEEK. IT'S JUST
14 PHYSICALLY NOT POSSIBLE FOR THAT TO HAPPEN.

15 THE COURT: I UNDERSTAND. THIS WHOLE DISCLOSURE OF
16 DOCUMENTS TOOK PLACE INTERESTINGLY DURING THE THANKSGIVING
17 HOLIDAYS WHEN THE COURTS WERE NOT IN SESSION AND LAWYERS WERE
18 UNAVAILABLE.

19 MR. GODKIN: WE WERE --

20 THE COURT: I JUST FIND THAT RATHER IRONIC OR RATHER
21 INTERESTING.

22 MR. GODKIN: YOUR HONOR, OBVIOUSLY I APOLOGIZE FOR
23 THAT. I WAS NOT SUPPOSED TO BE WORKING EITHER. AND I'M NOT
24 HAPPY ABOUT IT.

25 THE COURT: WELL, THE PLAINTIFFS AGREE THAT
26 MR. KRAMER SHALL TURN OVER THE LAPTOP AND DROPBOX ACCESS TO

1 THE INDEPENDENT FORENSIC EXAMINER PROPOSED BY FACEBOOK?

2 MR. GODKIN: AS FAR AS SIX4THREE IS CONCERNED, YES.

3 THE COURT: ALL RIGHT. DO YOU NEED TO MEET AND
4 CONFER WITH YOUR COUNSEL FOR A MOMENT?

5 MR. GROSS: SO, YOUR HONOR, THE -- WE DON'T HAVE A
6 PROBLEM WITH THE INDIVIDUAL OR THE FIRM THAT THEY'VE DONE. I
7 THINK WHAT'S IMPORTANT IS THAT THE COURT ORDER THAT NO ONE
8 INCLUDING FACEBOOK OR ANY OF THE DEFENDANTS. AND WE COULD
9 JUST SAY, "NO PARTY OR ATTORNEY OF PARTIES HAS ANY ACCESS TO
10 THESE MATERIALS UNTIL FURTHER ORDER BY THE COURT." WITH THAT,
11 WE HAVE NO PROBLEM AT ALL PROVIDING THAT PERSON.

12 I THINK I WOULD GO ONE STEP FURTHER AND REQUEST THAT
13 THAT -- THAT WE -- OR THAT THE COURT CONSIDER ORDERING THAT
14 INDEPENDENT THIRD PARTY TO TAKE WHATEVER ACTIONS OR THE
15 APPROPRIATE ACTIONS TO ENSURE THAT THE FILES ON THAT DROPBOX
16 WHICH ARE MARKED FOR DELETION DO NOT END UP ULTIMATELY
17 DELETED. THAT MAY BE ABOUT OUR CHANGING THE SETTINGS. BUT
18 REGARDLESS THE MOST IMPORTANT THING IS THAT IF THE COURT ORDER
19 INDICATES THAT IT IS TRULY AN INDEPENDENT PARTY AND WE GO FROM
20 THERE.

21 THE COURT: ALL RIGHT. SO I HEAR THAT THERE IS A
22 STIPULATION WITH SOME LIMITATIONS ON ACCESS; IS THAT RIGHT?
23 YOU AGREE TO TURN THESE DOCUMENTS OVER TO AN INDEPENDENT
24 FORENSIC EXAMINER, CORRECT?

25 MR. GODKIN: THE LAPTOP AND THE ACCESS TO THE
26 DROPBOX.

1 THE COURT: YES. VERY WELL.

2 MS. MEHTA: YOUR HONOR, I WOULD ADD TWO THINGS TO
3 THAT. ONE IS WE STILL DON'T KNOW WHERE THE THUMB-DRIVE IS AND
4 WHETHER MR. KRAMER OR COUNSEL OR MR. SCARAMELLINO HAVE THE
5 THUMB-DRIVE IN THEIR POSSESSION. SO IF THAT THUMB-DRIVE IS
6 ANYWHERE IN SIX4THREE OR ITS COUNSEL'S OR LEGAL TEAM'S
7 POSSESSION, WE ASK THAT THAT BE TURNED OVER THIS EVENING AS
8 WELL.

9 AND THEN WE ASK THAT MR. SCARAMELLINO'S LAPTOP ALSO
10 BE SURRENDERED. MR. SCARAMELLINO ACCORDING TO THE LETTER WE
11 GOT YESTERDAY AND ACCORDING TO COUNSEL'S STATEMENTS TODAY WAS
12 AT THE HEART OF THIS IN TERMS OF GETTING THAT -- IN TERMS OF
13 GETTING THAT INFORMATION TO MR. KRAMER, SO HIS LAPTOP SHOULD
14 ALSO BE IMAGED SO EVIDENCE CAN BE PRESERVED AND THEN THE
15 DROPBOX PASSWORD.

16 THE COURT: THAT RAISES THE ISSUES THAT MR. GODKIN
17 HAD JUST ARTICULATED ON THE RECORD WHICH IS THAT THERE IS
18 ATTORNEY/CLIENT PRIVILEGE ATTACHED TO OTHER CASES THAT MAY BE
19 ON HIS LAPTOP THAT HAVE NOTHING TO DO WITH THE INSTANT CASE.

20 MS. MEHTA: NOT WITH REGARD TO MR. SCARAMELLINO.

21 THE COURT: ALL RIGHT. WELL, IS MR. SCARAMELLINO AN
22 INDEPENDENT CONTRACTOR OR SOMEONE ASSOCIATED WITH THE FIRM AND
23 NOT AN EMPLOYEE OF THE FIRM?

24 MR. GODKIN: HE'S NOT AN EMPLOYEE OF THE FIRM, YOUR
25 HONOR. HE IS THE INVESTOR IN SIX4THREE. HE'S A YALE LAW
26 SCHOOL GRADUATE. HE HAS PASSED THE CALIFORNIA BAR I

1 UNDERSTAND, BUT HE HAS NOT BEEN ADMITTED YET. BUT HE HAS BEEN
2 WORKING WITH OUR FIRM IN THE CAPACITY OF A LAW CLERK. IT IS
3 MY UNDERSTANDING, YOUR HONOR, THAT HE IS CURRENTLY IN
4 NEW YORK. AND SO TO THE EXTENT THERE ARE ANY ORDERS REGARDING
5 HIS LAPTOP, IT'S GOING TO -- WE'RE GOING TO HAVE TO FIGURE OUT
6 HOW TO COMPLY WITH THEM PROMPTLY.

7 THE COURT: YES. PLEASE HOLD YOUR THOUGHT. I'VE
8 GOT A SIGNAL FROM MY COURT REPORTER WE'VE BEEN ON THE RECORD
9 QUITE A WHILE AND THERE'S BEEN VIGOROUS DISCUSSION ON THE
10 RECORD. WE'RE GOING TO TAKE ABOUT A 20-MINUTE BREAK FOR THE
11 COURT REPORTER. AND WE WILL RECONVENE AT 3:35. COURT IS IN
12 RECESS UNTIL 3:35. THANK YOU VERY MUCH, EVERYONE.

13 (WHEREUPON, A RECESS WAS TAKEN.)

14 THE COURT: ALL RIGHT. WE ARE BACK ON THE RECORD.
15 THE RECORD SHALL REFLECT ALL COUNSEL ARE PRESENT AT THE
16 COUNSEL TABLE. THE PLAINTIFF'S PRINCIPAL IS ALSO PRESENT WITH
17 HIS INDEPENDENT COUNSEL. WE WERE IN THE MIDST OF THE
18 PRESENTATION OF ARGUMENT BY THE PLAINTIFF MR. GODKIN AND
19 MR. GROSS. DO YOU HAVE ANYTHING FURTHER TO ARGUE AT THIS
20 TIME, SIR?

21 MR. GODKIN: THE ONLY POINT, YOUR HONOR, IS YOU
22 ASKED ABOUT WHERE THE THUMB-DRIVE IS OR MAYBE MS. MEHTA ASKED.

23 THE COURT: YES. WHERE IS THE THUMB-DRIVE?

24 MR. GODKIN: IT WAS SIMPLY A -- MR. KRAMER HAD A
25 NUMBER OF PERSONAL THUMB DRIVES IN HIS BACKPACK.

26 THE COURT: YES.

1 MR. GODKIN: HE WENT OUT AND HE GAVE IT TO
2 MR. COLLINS. AND WHAT MR. COLLINS DID WITH IT WE DON'T KNOW.
3 IT'S STILL IN HIS POSSESSION, AS FAR AS WE KNOW.

4 THE COURT: THAT THUMB-DRIVE WAS THE VEHICLE TO
5 TRANSMIT THE DOCUMENTS IN QUESTION, CORRECT?

6 MR. GODKIN: THAT'S WHAT I UNDERSTAND.

7 THE COURT: ALL RIGHT. IS THERE ANYTHING FURTHER?

8 MR. GODKIN: NO. THANK YOU, YOUR HONOR.

9 THE COURT: ALL RIGHT. MS. MEHTA.

10 MS. MEHTA: THANK YOU, YOUR HONOR. MY COLLEAGUE
11 MR. LERNER IS GOING TO ADDRESS THE ISSUES THAT CAME UP WITH
12 MR. GODKIN'S PRESENTATION WITH YOUR HONOR'S INDULGENCE.

13 THE COURT: ALL RIGHT. MR. LERNER.

14 MR. LERNER: THANK YOU, YOUR HONOR. I FIND MYSELF
15 IN THE UNUSUAL POSITION OF STARTING BY ANSWERING THE QUESTIONS
16 THAT YOU ASKED OPPOSING COUNSEL BECAUSE I THINK THAT WE CAN
17 ACTUALLY ANSWER THEM MORE HONESTLY AND ACCURATELY. BEFORE I
18 DO THAT, I WOULD LIKE TO EMPHASIZE THAT YOUR HONOR'S PUTTING
19 PEOPLE UNDER OATH SEEMS TO HAVE SHED SOME LIGHT ON THINGS IN
20 THE PAST. AND I CONTINUE TO THINK IT WILL CONTINUE TO DO SO
21 TODAY. I WILL OF COURSE FOLLOW YOUR LEAD. BUT IF AFTER WE'RE
22 FINISHED WITH THIS SECTION OF THE ARGUMENT, THERE ARE ANY
23 OUTSTANDING QUESTIONS WHICH I THINK THERE WILL BE FOR OPPOSING
24 COUNSEL, WE WOULD AGAIN SUGGEST THAT SOME OF THOSE SHOULD BE
25 UNDER OATH.

26 SO YOUR FIRST QUESTION IS REALLY WHAT HAPPENED WITH

1 THESE DOCUMENTS? WHY DID THEY END UP ON THE DROPBOX THAT
2 MR. KRAMER HAD ACCESS TO? AND AS YOU NOTED DIDN'T GET A
3 STRAIGHTFORWARD ANSWER. THE VERY STRAIGHTFORWARD ANSWER
4 IS THAT SIX4THREE'S LEGAL TEAM GAVE THOSE DOCUMENTS TO
5 DR. KRAMER -- TO MR. KRAMER. IF THE LEGAL TEAM HAD NOT
6 BREACHED THE PROTECTIVE ORDER ENTERED BY THIS COURT,
7 MR. KRAMER NEVER COULD HAVE DONE WHAT HE DID. HE COULDN'T
8 HAVE VIOLATED THE PROTECTIVE ORDER. AND HE COULDN'T HAVE GONE
9 ON TO VIOLATE YOUR HONOR'S ORDER OF NOVEMBER 20TH. WE ARE
10 HERE BECAUSE OF THE SIX4THREE LEGAL TEAM'S DECISION TO PUT
11 THOSE DOCUMENTS ON THAT DROPBOX.

12 NOW, LET'S TALK ABOUT THE SIX4THREE LEGAL TEAM AND
13 WHAT YOU HAVEN'T BEEN TOLD. YOU RECEIVED THE LETTER ON
14 NOVEMBER 29TH, WHICH YOU MENTIONED WHICH SAYS, "ON THE MORNING
15 OF NOVEMBER 20TH, 2018, WE FURTHER DISCOVERED THAT A MEMBER OF
16 SIX4THREE'S LEGAL TEAM THOMAS SCARAMELLINO HAD PREVIOUSLY
17 PLACED UNREDACTED DOCUMENTS IN THIS FOLDER."

18 MR. SCARAMELLINO IS, AS DISCUSSED, A THIRD PARTY
19 INVESTOR WHO IS NOT A LAWYER. HE'S COME UP IN THIS CASE
20 BEFORE BECAUSE WHEN WE FOUND OUT ABOUT HIM, WE SAID, "WHY ARE
21 OUR DOCUMENTS BEING SHARED WITH A NONPARTY NONLAWYER?" WHEN
22 WE RAISED THAT, SUDDENLY HE BECAME PART OF THE LEGAL TEAM. WE
23 NEVER HEARD THAT BEFORE. WE NEVER SEEN ANYTHING TO SUGGEST
24 THAT HE WAS A MEMBER OF THEIR LEGAL TEAM. BUT WHEN WE SAID,
25 "LET'S SEE THE COMMUNICATIONS WITH HIM," SUDDENLY HE BECAME A
26 MEMBER OF HIS LEGAL TEAM.

1 NOW, HE DIDN'T JUST BECOME A MEMBER OF THE LEGAL
2 TEAM. IN ORDER TO PRESERVE PRIVILEGE OVER COMMUNICATIONS WITH
3 MR. SCARAMELLINO, MR. GODKIN FILED A DECLARATION IN THIS COURT
4 SIGNED UNDER PENALTY OF PERJURY. AND IN THAT DECLARATION, HE
5 SAID THE FOLLOWING. "MR. SCARAMELLINO HAS BEEN WORKING WITH
6 ME AND MY FIRM AS A MEMBER OF THE LEGAL TEAM SINCE MY FIRM WAS
7 RETAINED BY SIX4THREE WITH SIX4THREE'S FULL KNOWLEDGE AND
8 APPROVAL. MR. SCARAMELLINO IS PERFORMING LEGAL RESEARCH, FACT
9 INVESTIGATION, ASSEMBLY OF DATA AND INFORMATION AND
10 PREPARATION OF PLEADINGS AND ANY OTHER WORK THAT I DECIDE WILL
11 ASSIST ME AND MY FIRM IN CARRYING OUT THE REPRESENTATION OF
12 SIX4THREE.

13 ALL OF THE TASKS PERFORMED BY MR. SCARAMELLINO ARE
14 PERFORMED AT MY DIRECTION AND UNDER MY SUPERVISION. ALL OF
15 THE WORK PERFORMED BY MR. SCARAMELLINO HAS BEEN REVIEWED BY ME
16 OR ANOTHER ATTORNEY AT MY FIRM AND MERGED INTO MY FIRM'S WORK
17 PRODUCT."

18 SO THE ANSWER TO YOUR HONOR'S QUESTION AS TO WHAT
19 HAPPENED HERE IS THAT SIX4THREE'S LEGAL TEAM INCLUDING
20 MR. SCARAMELLINO GAVE MR. KRAMER ACCESS TO THESE DOCUMENTS
21 FULL STOP AND THAT'S WHY WE'RE HERE.

22 YOU ALSO ASKED A SET OF QUESTIONS ABOUT THE
23 DESTRUCTION OF DOCUMENTS. I ALREADY ADDRESSED WHAT WE ALL
24 KNOW WHICH IS LAWYERS PARTICULARLY IN THIS STATE ARE FAMILIAR
25 WITH THE TECHNOLOGY THAT HAS BEEN AROUND FOR QUITE A WHILE
26 ENOUGH TO KNOW THAT YOU DON'T SAY "DESTROY IT." YOU SAY "TAKE

1 AN IMAGE AND THEN WE WILL FIGURE IT OUT." WE COVERED THAT.

2 MR. GODKIN WILL NOT -- FROM THIS STATE IS ALSO AWARE
3 OF THIS. HIS OWN WEBSITE UNDER HIS NAME FOR DIRECTIONS FOR
4 PEOPLE TELLS GENERAL COUNSEL THAT THE GOLD STANDARD IS THE
5 SYSTEM WIDE MERE IMAGE BACK-UP, SO IT'S NOT A SECRET TO HIM
6 EITHER. YOU DON'T TELL PEOPLE TO DELETE STUFF. SO THAT THEN
7 GETS US TO THE IDEA THAT YOU'VE HEARD UNDER OATH IN SOME OF
8 THESE DECLARATIONS THAT THEY DON'T THINK ANY DOCUMENTS WERE
9 DESTROYED OR EVIDENCE WERE DESTROYED.

10 OF COURSE WE CAN'T KNOW THAT, AS YOUR HONOR POINTED
11 OUT. BUT IT'S ALSO DEMONSTRABLY INCORRECT THAT WHEN YOU
12 DELETE DOCUMENTS NOTHING IS LOST. THERE WILL BE THE LOSS OF
13 INFORMATION, THE METADATA FROM THOSE DOCUMENTS. THERE WILL IN
14 ALL LIKELIHOOD BE INFORMATION LOST. AND THAT WAS DONE AT
15 COUNSEL'S DIRECTION.

16 I THINK IT IS TROUBLING THAT THE EXPLANATION YOU
17 HEARD WAS VERY SIMILAR TO THE EXPLANATION THAT MR. KRAMER
18 PROVIDED. MR. COUNSEL -- MR. GROSS SAID, "I SUDDENLY FOUND
19 MYSELF IN AN IMPOSSIBLE POSITION, SO I DID IT." IT'S A LOT
20 LIKE MR. KRAMER'S, "I PANICKED AND I DID IT."

21 ALL OF THIS IS TURNING OUT TO BE UNFORTUNATELY A
22 FLAWED EXPLANATION FOR WHY THESE DOCUMENTS ENDED UP IN
23 MR. KRAMER'S POSSESSION AND HE THEN DISCLOSED THEM WHEN THE
24 ANSWER IS VERY CLEAR. THEIR LEGAL TEAM GAVE THEM TO
25 MR. KRAMER AND THEN MR. KRAMER DISCLOSED THEM. AS FOR NOT
26 KNOWING ABOUT THIS PREVIOUSLY, THAT'S CONTRARY TO THE

1 DOCUMENTS THAT HAVE BEEN SUBMITTED TO YOUR HONOR ALREADY.

2 YOU CAN SEE THAT FROM THE DOCUMENTS THAT ARE ALREADY
3 IN FRONT OF YOU. THEY SAY, "OH, WE ONLY LEARNED OF THIS JUST
4 THIS PAST WEEK." THEY SAY THAT WE DIDN'T KNOW THAT MR. KRAMER
5 WAS AWARE OF ANY OF THESE DOCUMENTS UNTIL THE 19TH. WELL, WE
6 CAN TELL FROM MR. KRAMER'S OWN EMAILS ATTACHED TO HIS
7 DECLARATION THAT HE WAS ALREADY SAYING IN MAY OF 2018 THAT
8 THESE DOCUMENTS WERE QUOTE "STORED ON A FILE SERVER IN THE
9 CLOUD." KRAMER DECLARATION PARAGRAPH 3.

10 WE ALREADY KNOW THAT HE TOLD SOMEONE WORKING FOR THE
11 COMMITTEE, "I CAN CONFIRM THAT YOUR DESCRIPTION OF THE
12 DOCUMENTS IN MY POSSESSION IS ACCURATE." NOT ONLY THAT, BUT
13 HE WENT ON TO SAY, "I THINK THEY'D BE HIGHLY RELEVANT TO YOUR
14 INVESTIGATION."

15 NOTABLY COUNSEL IS NOT SAYING HE NEVER HAS SAID THAT
16 THE LEGAL TEAM WAS UNAWARE OF THESE COMMUNICATIONS OR DIDN'T
17 KNOW ANYTHING ABOUT THEM. AND TELLINGLY MR. SCARAMELLINO
18 ISN'T HERE. SO, AGAIN, WHAT YOU SEE IS A SET OF DOCUMENTS
19 THAT WERE SHARED WITH MR. KRAMER IN VIOLATION OF THE
20 PROTECTIVE ORDER. AND A SET OF DOCUMENTS, BY THE WAY, WAS PUT
21 AT ISSUE IN THIS CASE BY MR. GODKIN. SO HE CREATES A
22 DECLARATION WITH HUNDREDS OF PAGES OF EXHIBITS. MANY OF WHICH
23 YOUR HONOR HAVING GONE THROUGH THEM IN CAREFUL DETAIL POINTED
24 OUT DIDN'T HAVE ANYTHING TO DO WITH WHAT WE'RE TALKING ABOUT.

25 BUT SOMEHOW FOR SOME REASON THEY WERE ATTACHED TO
26 HIS DECLARATION. AND THEN LOW AND BEHOLD, THAT DECLARATION

1 THAT THE ATTORNEYS DRAFTED WITH DOCUMENTS THAT DIDN'T HAVE
2 ANYTHING TO DO WITH THIS CASE IS DESCRIBED IN CAREFUL DETAIL
3 BY MR. KRAMER FOR THIRD PARTIES. AND MR. KRAMER INITIALLY
4 INVITES THEM TO SERVE A SUBPOENA IN CALIFORNIA THAT SAYS, "BY
5 THE WAY IF YOU DO THAT, I'LL BE SUBJECT TO THE POWER OF THE
6 CALIFORNIA COURT."

7 AND THEN WHEN YOU ASK MR. KRAMER ARE YOU TELLING THE
8 TRUTH ABOUT EVERYTHING IN YOUR DECLARATION TODAY, IT'S ALSO
9 WORTH NOTING THAT WHILE MR. KRAMER'S DECLARATION SAYS, YEAH,
10 WHEN THE COMMITTEE CONTACTED ME I SAID UNEQUIVOCALLY, NO, I
11 CAN'T DO THAT. IN FACT, WHAT HIS DECLARATION SHOWS IN THE
12 EMAILS THAT ARE ATTACHED IS WHAT HE TOLD THEM IS I CAN'T
13 VOLUNTARILY DO THAT.

14 AND LOW AND BEHOLD HE GETS SERVED WITH AN ORDER FOR
15 THE DECLARATION THAT COUNSEL CREATED WITH DOCUMENTS THAT HAVE
16 NOTHING TO DO WITH THIS CASE. AND IT ALL GETS DISCLOSED WHEN
17 HE DECIDES TO WALK OVER TO PARLIAMENT WITH A COMPUTER THAT IN
18 A SOMEWHAT DISTURBING PATTERN OF DEFERENCE TO AND RESPECT FOR
19 THIS COURT, DOESN'T GET BROUGHT HERE TODAY.

20 HE CAN VOLUNTARILY BRING IT TO PARLIAMENT WHEN HE
21 THINKS HE'S GOING TO WALK IN AND MIRACULOUSLY COLD-CALL A
22 MEMBER OF PARLIAMENT AND GET THEM TO AGREE WITH THEM WITH A
23 THUMB-DRIVE. BUT WHEN YOUR HONOR SCHEDULES A HEARING, THE
24 COMPUTER ISN'T HERE.

25 SO THAT ALL LEADS TO THE ARGUMENT ON THE LAWYERS.
26 TO BE VERY CLEAR, THERE IS NOT A PRIVILEGED ISSUE. I DON'T

1 WANT TO TALK WITH THEM ABOUT THEIR PRIVILEGED COMMUNICATIONS.
2 ALL I NEED IS THREE HOURS WITH BOTH OF THESE GENTLEMEN TO
3 COVER THE ISSUES THAT THEY HAVE PUT IN FRONT OF YOUR HONOR.
4 THEY HAVE SUBMITTED DECLARATIONS TO YOU WITH EXHIBITS AND
5 THEY'VE SUBMITTED LETTERS TO YOU.

6 WE CAN ASK THEM ABOUT THAT INFORMATION AND NATURALLY
7 THE INFORMATION THEY OMITTED. FOR EXAMPLE, YOU HEARD, I
8 HAVEN'T HAD ANY CONTACT WITH THE COMMITTEE. THERE ARE NO
9 DOCUMENTS SHOWING CONTACT WITH THE COMMITTEE. WHAT IF WE
10 ASKED MR. GODKIN TODAY DID MR. SCARAMELLINO OF YOUR LEGAL TEAM
11 WHO DOES EVERYTHING UNDER YOUR SUPERVISION AT YOUR DIRECTION?
12 DID HE HAVE CONTACT WITH THE COMMITTEE? DID MR. SCARAMELLINO
13 HAVE CONTACT WITH ANY THIRD PARTIES LIKE MEMBERS OF THE MEDIA?

14 THOSE ARE NOT PRIVILEGED QUESTIONS. THOSE ARE ABOUT
15 THE DISCLOSURE OF THIS INFORMATION IN VIOLATION OF YOUR
16 HONOR'S ORDERS TO THIRD PARTIES. THAT CAN BE COVERED IN THREE
17 HOURS. AND BY THE WAY, IF THEY ARE WORRIED ABOUT THE
18 PRIVILEGE, THEN WE ARE PERFECTLY HAPPY TO PROPOSE JUDGE KRAMER
19 OR OTHER FORMER STATE COURT JUDGES FROM THIS AREA WHO ARE NOW
20 WORKING AS REFEREES. THEY CAN SIT THERE. YOUR HONOR COULD
21 APPOINT THEM RIGHT NOW WITHOUT ANY BRIEFING OR ANYTHING ELSE
22 UNDER THE CIVIL CODE. THEY COULD HEAR ANY DISPUTES DURING
23 THOSE DEPOSITIONS.

24 WITH RESPECT TO THE DOCUMENTS, WE CAN AND SHOULD
25 FOLLOW EXACTLY THE SAME PROCESS THAT WE ARE FOLLOWING FOR
26 MR. KRAMER AND MR. SCARAMELLINO. WHY? WE SHOULD FOLLOW IT

1 FOR A COUPLE OF REASONS. FIRST OF ALL, AS MR. GODKIN ADVISES
2 PEOPLE, IT'S THE WAY YOU DO THIS. SECOND, WE'RE NOT ASKING TO
3 SEE IT RIGHT NOW. ALL WE WANT TO DO IS HAVE IT PRESERVED.
4 AND THE REASON THAT'S SO IMPORTANT IS THEY CAN'T EVEN ANSWER
5 YOUR QUESTIONS IN THIS COURT TODAY ABOUT WHERE THIS
6 INFORMATION IS CURRENTLY. WHAT'S HAPPENING WITH IT. WHAT THE
7 PROBLEMS ARE. IF THEIR COMPUTERS ARE NOT IMAGED, THERE ARE NO
8 GUARANTEES ABOUT THE PRESERVATION OF THAT INFORMATION. AND
9 IMPORTANTLY WITH RESPECT TO PEOPLE'S MEMORIES, I GUARANTEE IF
10 A WEEK OR TWO GOES BY, PEOPLE ARE GOING TO START SAYING I
11 CAN'T REMEMBER. I'M SORRY I CAN'T RECALL WHAT
12 MR. SCARAMELLINO WAS DOING.

13 THOSE COMPUTERS NEED TO BE IMAGED. IT'S NOT THE
14 SAME AS SAYING GIVE THEM TO ME, JOSH LERNER. IT IS SAYING AS
15 A MATTER OF BASIC DOCUMENT PRESERVATION, LETS IMAGE THEM JUST
16 AS YOU ADVISE PEOPLE SHOULD BE DONE IN LITIGATION. THEN THEY
17 CAN HOLD TIGHT AND PEOPLE DON'T NEED TO WORRY ABOUT IT, BUT
18 THAT SHOULD BE DONE.

19 WITH RESPECT TO THE DOCUMENTS THAT WE'VE BEEN
20 TALKING ABOUT, I WANT TO START WITH THE DOCUMENTS ATTACHED TO
21 MR. KRAMER'S DECLARATION WHICH YOU ASKED HIM ABOUT.
22 MR. KRAMER SENT AN EMAIL THAT HAS THREE ATTACHMENTS. IF YOU
23 LOOK AT EXHIBIT 1 TO MR. KRAMER'S DECLARATION, YOU CAN SEE
24 THREE ATTACHMENTS.

25 THE COURT: ICONS FOR ATTACHMENTS.

26 MR. LERNER: CORRECT. HE SAYS IN HIS EMAIL THAT

1 HE'S ATTACHING THEM FOR MR. COLLINS REVIEW.

2 THE COURT: YES.

3 MR. LERNER: WE HAVE ASKED FOR THOSE ATTACHMENTS.
4 AND AS YOU HEARD OPPOSING COUNSEL SAY "WE'LL PRODUCE THEM
5 EVENTUALLY."

6 THE COURT: THERE'S NO EVENTUALITY ABOUT IT.

7 MR. LERNER: RIGHT. I DON'T KNOW HOW IT IS POSSIBLE
8 THAT WE ARE SITTING HERE RIGHT NOW WITHOUT THOSE DOCUMENTS.
9 BECAUSE WITHOUT THEM, IT'S IMPOSSIBLE FOR EXAMPLE FOR
10 MR. KRAMER OR ANYBODY ELSE TO TELL YOU THAT HIS DECLARATION IS
11 ACCURATE.

12 THE COURT: YOU KNOW, I'VE BEEN VERY PATIENT OVER
13 THE PAST FEW WEEKS AND THE PAST FEW DAYS WITH REGARD TO THESE
14 MATTERS. I MUST SAY, HOWEVER, WHAT HAS HAPPENED IS
15 UNCONSCIONABLE. IT SHOCKS THE CONSCIENCE. AND YOUR CONDUCT
16 IS NOT WELL TAKEN BY THIS COURT.

17 IT'S ONE THING TO SERVE OTHER NEEDS THAT ARE OUTSIDE
18 THE SCOPE OF THIS LAWSUIT, BUT YOU DON'T SERVE THOSE NEEDS OR
19 SATISFY THE CURIOSITIES OF INQUIRING PARTIES WHEN THERE'S A
20 COURT ORDER PREVENTING YOU TO DO SO.

21 IT IS RATHER CURIOUS THAT THE SAME LAPTOP THAT WAS
22 USED TO DOWNLOAD ONTO A THUMB-DRIVE CONFIDENTIAL INFORMATION
23 SUBJECT TO THE PROTECTIVE ORDERS OF MY SUBSEQUENT ORDERS TO
24 SEAL IS NOT AVAILABLE IN THIS COURT TODAY. IT WAS AVAILABLE
25 TO THE HOUSE OF COMMONS DCMS BUT NOT TO ME.

26 AND THERE IS NO EXCUSE TO HAVE A LAPTOP AVAILABLE TO

1 A SUBCOMMITTEE OF THE HOUSE OF COMMONS INQUIRING ON MATTERS
2 THAT ARE NOT WITHIN THE FOUR CORNERS OF THIS LAWSUIT AND YET
3 MAKE IT UNAVAILABLE TO THIS COURT WHEN YOU HAVE A HEARING
4 TODAY AT 2:00 O'CLOCK WHICH I DULY NOTICED BY THE ORDERS THAT
5 I ISSUED.

6 MR. LERNER, YOU MAY CONTINUE.

7 MR. LERNER: I THINK YOUR HONOR PUT IT BETTER THAN I
8 COULD HAVE. AND I WANT TO CLOSE WITH THE FOLLOWING ON THIS
9 TOPIC. WE ARE ASKING FOR THE TWO LIMITED DEPOSITIONS I JUST
10 DESCRIBED AND FOR FORENSIC IMAGES THAT JUST PRESERVE
11 INFORMATION. WHY IS THAT SO IMPORTANT? IF I CAN HUMBLY SPEAK
12 ON BEHALF OF LAWYERS IN THIS STATE, I HAVE LOOKED LONG AND
13 HARD FOR NOT JUST THE CASE IN THIS STATE BUT A CASE ANYWHERE
14 THAT INVOLVES SOMETHING LIKE THIS, AND I CAN'T FIND ONE. I
15 HAVE FOUND SITUATIONS IN WHICH COUNSEL DISCLOSED THE PROFITS
16 OF A COMPANY IN VIOLATION OF A PROTECTIVE ORDER AND THERE WERE
17 SERIOUS CONSEQUENCES. I HAVE FOUND SITUATIONS IN WHICH
18 INFORMATION WAS DISCLOSED TO EXPERTS, BUT NOT IN A WAY THAT IT
19 SAW THE LIGHT OF DAY AND THERE WERE SERIOUS CONSEQUENCES.

20 IF THERE ARE NOT CONSEQUENCES HERE, THE TRUST THAT
21 HAS BEEN ESTABLISHED OVER THE COURSE OF MY ENTIRE CAREER AND
22 PEOPLE LONG BEFORE ME THAT ENABLES ME TO TELL MY CLIENTS AND
23 ENABLES MY OPPOSING COUNSEL TO TELL THEIR CLIENTS, I
24 UNDERSTAND YOUR ENGINEERS ARE TERRIFIED ABOUT PRODUCING THIS
25 INFORMATION. I UNDERSTAND YOUR EXECUTIVES, OF COURSE, HAVE TO
26 HAVE GROWN UP DISCUSSIONS AMONGST THEMSELVES WHERE THEY ARE

1 ABLE TO DELIBERATE HONESTLY AND OPENLY AND HAVE A MARKETED
2 PLACE OF IDEAS.

3 I UNDERSTAND YOU'RE WORRIED THAT ALL THAT COULD SEE
4 THE LIGHT OF DAY, BUT NO JUDGE HAS EVER LET THAT HAPPEN. NO
5 LAWYER HAS EVER JUST GONE OUT AND PRODUCED ALL OF IT. THAT'S
6 WHAT WE ALWAYS SAY IN ORDER TO MAKE PEOPLE COMFORTABLE WITH
7 DOCUMENT PRODUCTIONS THAT THIS COURT AND OTHER COURTS NEED IN
8 ORDER TO RULE ON CASES.

9 I CAN'T SAY THAT ANYMORE. NEITHER CAN THEY. AS A
10 RESULT OF WHAT HAPPENED HERE, LAWYERS CAN NO LONGER SAY --
11 IT'S NEVER HAPPENED. PEOPLE DON'T GO OUT AND PRODUCE HUNDREDS
12 OF DOCUMENTS TO FOREIGN GOVERNMENT. WE CAN'T SAY JUDGES
13 PROTECT THIS CONDUCT. THIS HAPPENED IN OPEN DEFIANCE OF YOUR
14 HONOR'S ORDERS.

15 THE COURT: THE ENDS DO NOT JUSTIFY THE MEANS.
16 WHATEVER YOU'RE TRYING TO ACCOMPLISH, THE ENDS DO NOT JUSTIFY
17 THE MEANS. PARTICULARLY WHEN MY ORDERS ARE VIOLATED IN
18 RELATION TO THIS CASE.

19 ONE ORDER I'M GOING TO MAKE RIGHT NOW, MR. GODKIN
20 AND MR. GROSS, THE GROSS & KLEIN FIRM AND THE BIRNBAUM &
21 GODKIN FIRM AND COUNSEL STUART GROSS, DAVID S. GODKIN AND
22 JAMES KRUZER SHALL REMAIN IN THIS CASE AND SHALL NOT WITHDRAW
23 FROM REPRESENTATION OF PLAINTIFF UNTIL THE MATTERS IN RELATION
24 TO THE DISTRIBUTION OF THOSE CONFIDENTIAL DOCUMENTS IS
25 RESOLVED. YOU'RE NOT GOING ANYWHERE. AND YOU ARE ORDERED TO
26 REMAIN IN THIS CASE.

1 MR. GODKIN: WE'VE ALWAYS HAD EVERY INTENTION OF
2 DOING SO FOR THE PURPOSE OF RESOLVING THESE ISSUES, YOUR
3 HONOR.

4 THE COURT: THAT IS ONE OF THE ORDERS OF THIS COURT.
5 MR. KRAMER'S LAPTOP SHALL BE SURRENDERED TO THE FORENSIC
6 EXAMINER. AND I'M GOING TO HAVE MORE DETAILED INSTRUCTIONS IN
7 MY ORDER. BUT THAT FORENSIC EXAMINER WILL BE ORDERED NOT TO
8 DISCLOSE ANY FINDINGS OR EVIDENCE TO EITHER PARTY UNTIL
9 FURTHER ORDER OF THE COURT.

10 SINCE THE PARTIES HAVE AGREED TO STROZ FRIEDBERG,
11 MS. MEHTA IS ATTEMPTING TO OBTAIN THE ADDRESS FOR THE DELIVERY
12 OF THE LAPTOP. AND WE NEED THAT ADDRESS SO THAT I CAN PREPARE
13 MY ORDER. AND MIND YOU, EVERYONE, YOU'RE GOING TO REMAIN IN
14 THE COURTROOM UNTIL MY ORDER IS FINISHED. AND IT'S GOING TO
15 TAKE A FEW MOMENTS TO COMPLETE THIS ORDER THAT I MAKE RULING
16 ON THE EX PARTE APPLICATION THAT FACEBOOK HAS MADE AS WELL AS
17 THE OTHER MATTERS THAT ARE RELATED TO THE PROCEEDINGS TODAY.

18 MS. MEHTA: YOUR HONOR, I CAN DO IT NOW OR I CAN DO
19 IT LATER. I WANTED TO ADDRESS THE LOGISTICS OF THE DELIVERY
20 OF THE LAPTOP --

21 THE COURT: YES.

22 MS. MEHTA: -- TO STROZ FRIEDBERG. SO
23 STROZ FRIEDBERG HAS PEOPLE ON THE GROUND HERE IN
24 SAN FRANCISCO. THEY ALSO HAVE PEOPLE ON THE GROUND IN
25 NEW YORK IN THE EVENT THAT YOUR HONOR WERE TO ORDER
26 MR. SCARAMELLINO'S LAPTOP BE IMAGED. AND ALSO BOSTON IN THE

1 EVENT THAT WE NEED BIRNBAUM AND GODKIN'S INFORMATION TO BE
2 IMAGED FOR PRESERVATION PURPOSES.

3 THEY CAN HAVE PEOPLE AT MR. KRAMER'S WHATEVER
4 LOCATION MR. KRAMER'S LAPTOP IS AT AT MR. SCARAMELLINO'S
5 LOCATION FOR HIS LAPTOP AND THE BIRNBAUM & GODKIN LAW FIRM AND
6 ALL THE RELEVANT PLACES TONIGHT TO PICK UP THE DRIVES.

7 THE COURT: WHERE?

8 MS. MEHTA: SO WHAT WE WOULD NEED IS THE ADDRESSES
9 FROM SIX4THREE AND FOR MR. KRAMER AND FOR MR. SCARAMELLINO AS
10 TO WHERE THE RELEVANT DEVICES FOR MR. KRAMER, MR. SCARAMELLINO
11 AND COUNSEL ARE. AND THEN THE INDEPENDENT FIRM STROZ
12 FRIEDBERG WILL HAVE SOMEONE GO AND PICK THEM UP.

13 THE COURT: OKAY. WHAT'S THE TIMEFRAME IN PICKING
14 THESE UP?

15 MS. MEHTA: THEY CAN DO IT TONIGHT.

16 THE COURT: WELL, THEY CAN DO IT TONIGHT BUT WHEN
17 TONIGHT?

18 MS. MEHTA: I THINK WE COULD HAVE IT WITHIN A FEW
19 HOURS, YOUR HONOR. CERTAINLY BY 8:00 P.M.

20 THE COURT: WELL, WHAT I SUGGEST IS THAT
21 MR. SCARAMELLINO AND MR. KRAMER HAVE COUNSEL PRESENT WHEN
22 THESE LAPTOPS ARE HANDED OVER. IN OTHER WORDS, I DON'T WANT
23 IT HANDED OVER WITHOUT THE SUPERVISION OF COUNSEL. ALL RIGHT?

24 MS. MEHTA: UNDERSTOOD.

25 THE COURT: EACH COUNSEL ARE OFFICERS OF THE COURT.
26 AND THEY ARE HELD IN THE HIGHEST REGARD. AT LEAST WITH REGARD

1 TO THIS COURT, THE EXPECTATIONS ARE HIGH BECAUSE THEY ARE
2 MEMBERS OF THE BAR. AND THEIR SUPERVISION OF THE CLIENT
3 SHOULD BE DONE WHEN THE LAPTOPS ARE TURNED OVER TO THE
4 FORENSIC EXAMINERS. SO LOGISTICALLY HOW DO WE MAKE THAT
5 HAPPEN?

6 MS. MEHTA: SO, YOUR HONOR, WITH RESPECT TO
7 MR. KRAMER, THAT SHOULD BE EASY. MR. KRAMER IS HERE. HE
8 LIVES HERE. PRESUMABLY THE LAPTOP IS SOMEWHERE IN THE
9 BAY AREA. HE HAS COUNSEL WITH HIM TODAY, SO THEY SHOULD BE
10 ABLE TO ATTEND ANY INSPECTION.

11 THE COURT: ALL RIGHT. HOW ABOUT HAVING EVERYONE
12 CONGREGATE AT MR. GROSS'S FIRM. AND THEN HAVING THE FORENSIC
13 EXAMINER MEET EVERYONE AT MR. GROSS'S FIRM.

14 MS. MEHTA: THAT'S NO PROBLEM, YOUR HONOR.

15 THE COURT: IT WOULD BE PROFICUOUS TO HAVE EVERYONE
16 IN ONE PLACE SO THAT THERE'S ONE STOP BY YOUR FORENSIC
17 EXAMINERS.

18 MS. MEHTA: THE ISSUE IS MR. SCARAMELLINO WHO I TAKE
19 IS NOT IN CALIFORNIA EVEN THOUGH HE HAS A BUSINESS HERE, I
20 THINK HE'S CURRENTLY IN NEW YORK. WE CAN HAVE THE INDEPENDENT
21 FIRM GO AND HAVE SOMEONE PICK UP THE DEVICES OR IMAGE THE
22 DEVICES FOR MR. SCARAMELLINO. OBVIOUSLY GETTING COUNSEL THERE
23 BY TONIGHT IS GOING TO BE DIFFICULT SINCE EVERYONE IS HERE.

24 AND I ALSO THINK GIVEN HIS ROLE AT THE VERY HEART OF
25 ALL OF THIS, THAT DELAYING THE COLLECTION OF HIS DATA AND
26 IMAGE IS A RISK THAT WE OUGHT NOT TAKE. AND SO THE QUESTION

1 IS WHETHER YOUR HONOR WOULD PERMIT THE COLLECTION OF
2 MR. SCARAMELLINO'S IMAGE DATA BY THE INDEPENDENT FIRM.
3 IRRESPECTIVE OF THE PRESENCE OF COUNSEL, HE WAS FUNCTIONING
4 UNDER A LEGAL TEAM SO PRESUMABLY HE'S IN A QUASI LEGAL
5 CAPACITY ANYWAY GIVEN WHAT THEY'VE DONE. THAT ONE I THINK
6 NEEDS TO HAPPEN TONIGHT. I DON'T KNOW THAT WE'RE GOING TO GET
7 EVERYONE THERE TONIGHT.

8 THE COURT: I HAVEN'T MADE A DECISION ON
9 MR. SCARAMELLINO'S LAPTOP IN ANY EVENT. AND I'M GOING TO HAVE
10 TO THINK ABOUT THAT AS I DRAFT THE REMAINDER OF THE ORDER. IS
11 THERE ANYTHING FURTHER? MR. GODKIN, DID YOU HAVE ANY
12 RESPONSES TO MR. LERNER'S ARGUMENTS?

13 MR. GODKIN: YOUR HONOR, MR. LERNER'S ARGUMENT ABOUT
14 MAKING AN IMAGE OF MR. KRAMER'S LAPTOP WHILE HE WAS IN THE
15 U.K. LAST WEEK, THE WHOLE PROBLEM WAS HE -- WE LEARNED HE WAS
16 THERE. HE WAS THERE BY HIMSELF. WE WERE NOT THERE. IT WAS
17 NOT POSSIBLE TO MAKE AN IMAGE OF HIS COMPUTER LAST WEEK, SO I
18 UNDERSTAND THAT YOU MAY THINK THAT WHAT WE DID WAS NOT ENOUGH
19 OR WAS WRONG. BUT OUR INTENT WAS IN GOOD FAITH TO DO WHAT WE
20 COULD TO TRY TO AVOID THIS PROBLEM.

21 THE COURT: ALL RIGHT. THANK YOU.

22 MR. THOREEN: IF I MAY BRIEFLY?

23 THE COURT: YES.

24 MR. THOREEN: JUST VERY BRIEFLY. I WON'T BELABOR
25 THE POINT BECAUSE MR. KRAMER LEARNED YESTERDAY MORNING THAT
26 HIS COUNSEL FOR PLAINTIFFS IN THIS CASE COULDN'T REPRESENT HIM

1 IN THIS MATTER, SO I'VE BEEN ON BOARD FOR ABOUT 21 HOURS.

2 ONE THING THAT I DID WANT TO LET THE COURT KNOW THAT
3 IN THE LAST 24 HOURS, WE'VE ENGAGED DC INTERNATIONAL LAW FIRM
4 WHICH IS GOING TO UNDERTAKE WHATEVER EFFORTS IT CAN UNDER
5 BRITISH LAW TO EITHER OBTAIN THE DOCUMENTS THAT WERE PROVIDED
6 TO THE COMMITTEE OR TO AT LEAST SECURE AGREEMENT THAT THEY
7 WILL NOT BE RELEASED IN ANY FASHION.

8 THE COURT: I CERTAINLY HOPE THAT THOSE DOCUMENTS
9 ARE RETRIEVED, BUT THEY PROBABLY HAVE BEEN COPIED TO OTHER
10 FLASH DRIVES OR THUMB DRIVES OR COMPUTERS. AND THEY'RE IN THE
11 ETHER AND THEY MAY NOT BE -- IT MAY NOT BE POSSIBLE TO
12 RETRIEVE THIS INFORMATION.

13 MR. THOREEN: I UNDERSTAND, YOUR HONOR.

14 THE COURT: ALL RIGHT. ANYTHING FURTHER BY COUNSEL?

15 MS. MEHTA: NO, YOUR HONOR. ON THAT LAST POINT, I
16 WILL SAY THAT THE DOCUMENTS HAVE ALREADY BEEN USED PUBLICLY.
17 THEY ARE ALREADY OUT THERE. IT'S NOT A QUESTION OF WHETHER.
18 IT'S A QUESTION OF HOW MUCH NOW MORE IS GOING TO BE RELEASED
19 AND HAS ALREADY BEEN RELEASED. AND I THINK THE FINAL POINT
20 JUST TO ECHO SOMETHING THAT MR. LERNER SAID AND, YOU KNOW, THE
21 FINAL REQUEST THAT WE WOULD MAKE TO YOUR HONOR AS YOU GO BACK
22 TO CONSIDER THIS IS TO -- WHEN YOU SCRUTINIZE THE DECLARATION
23 FOR MR. KRAMER AND FROM THE LAWYERS, TO THINK ABOUT WHETHER OR
24 NOT IT IS CREDIBLE THAT MR. KRAMER DID THIS ON HIS OWN GIVEN
25 HIS OWN STATEMENTS ABOUT THE INVOLVEMENT OF HIS LEGAL TEAM IN
26 ALL OF HIS COMMUNICATIONS WITH THE DCMS COMMITTEE AND WITH THE

1 MEDIA ENTITIES INVOLVED IN THIS.

2 AND GIVEN THAT AND GIVEN THE WAY THIS ALL CAME ABOUT
3 WHERE IT WAS DONE AT THE HANDS OF THE VERY PERSON THE LEGAL
4 TEAM SAID THEY WERE CLOSELY OVERSEEING, IT IS I THINK AT LEAST
5 SUBJECT TO SERIOUS QUESTION HOW MUCH KNOWLEDGE AND INVOLVEMENT
6 THE LAWYERS HAVE HAD THROUGHOUT THIS WHOLE PROCESS.

7 WE HAVE SEEN THE LAWYERS TALKING TO THE MEDIA
8 THROUGHOUT THIS CASE. WE HAVE SEEN THEM INVOLVED IN THESE
9 ULTERIOR EXTRAJUDICIAL AVENUES OF WHATEVER RELIEF THEY'RE
10 TRYING TO GET. THEIR INVOLVEMENT IS CENTRAL. AND TO PRESERVE
11 THE EVIDENCE AND THEN TAKE THE LIMITED DEPOSITION TO GET TO
12 THE BOTTOM OF WHAT THEIR ROLE WAS IS INCREDIBLY IMPORTANT
13 HERE BEYOND MERELY THE INVOLVEMENT OF MR. KRAMER AND
14 MR. SCARAMELLINO. THAT'S A GIVEN. WE KNOW THEY VIOLATED THE
15 PROTECTIVE ORDER.

16 THE QUESTION IS TO WHAT EXTENT WAS COUNSEL INVOLVED
17 AND THERE IS -- THERE ARE RED FLAGS EVERYWHERE THAT SUGGEST
18 THAT COUNSEL WAS INVOLVED AND FROM OUR PERSPECTIVE VERY HUMBLY
19 IT IS INCREDIBLY IMPORTANT THAT THE COURT GET TO THE BOTTOM OF
20 THAT BECAUSE OF MR. LERNER'S FINAL POINT WHICH IS THE WHOLE
21 SYSTEM OF DISCOVERY BREAKS DOWN IF LAWYERS CAN'T BE TRUSTED
22 WITH CONFIDENTIAL INFORMATION OR FIND AVENUES TO END RUN
23 AROUND THE COURT'S ORDERS FOR WHATEVER TACTICAL GAME THEY
24 PERCEIVE THEY ARE GOING TO GET BY DISCLOSING INFORMATION TO
25 THE MEDIA OR TO OTHER ENTITIES.

26 IT IS NOT JUST MR. KRAMER AND MR. SCARAMELLINO THAT

1 HAVE UNDERMINED THAT VERY FUNDAMENTAL PREMISE SYSTEM. THERE'S
2 AT LEAST A SUBSTANTIAL REASON TO BELIEVE THE LAWYERS HAD
3 KNOWLEDGE OF IT AND WERE INVOLVED IN THAT AS WELL, YOUR HONOR.

4 THE COURT: THANK YOU.

5 MR. GODKIN: YOUR HONOR, MAY I MAKE ONE FINAL POINT?

6 THE COURT: YES, SIR.

7 MR. GODKIN: TO REITERATE WHAT I SAID EARLIER, TO
8 THE EXTENT THAT YOU ARE INCLINED TO ORDER DOCUMENTS FROM THE
9 LAWYERS AND DEPOSITIONS FROM THE LAWYERS, I WOULD RESPECTFULLY
10 REQUEST THAT YOU GIVE US AN OPPORTUNITY TO BE HEARD. SO THAT
11 WE CAN FULLY BRIEF PRIVILEGE ISSUES AS WELL AS GIVE US
12 SUFFICIENT TIME TO ENGAGE COUNSEL TO REPRESENT US AT ANY
13 DEPOSITIONS THAT MAY TAKE PLACE.

14 IN OTHER WORDS, MS. MEHTA AND MR. LERNER ARE ASKING
15 FOR A LOT OF THINGS TO HAPPEN NEXT WEEK. AS A PRACTICAL
16 MATTER, THAT GIVES US NO TIME AT ALL TO ENGAGE COUNSEL AND
17 DEAL WITH ALL THESE ISSUES. SO I WOULD JUST RESPECTFULLY
18 REQUEST THAT YOUR ORDER ALLOW SUFFICIENT TIME SO THAT WE CAN
19 TAKE CARE OF THOSE THINGS.

20 THE COURT: OKAY. THANK YOU, MR. GODKIN. I WANT TO
21 REITERATE THE FACT THAT THE REASON THAT YOU ARE IN THIS FIX IS
22 BECAUSE AT THE VERY LEAST OF YOUR PRINCIPAL PLAINTIFF AND HIS
23 CONDUCT. THANK YOU.

24 THE COURT IS GOING TO TAKE A RECESS WHILE IT
25 FASHIONS AN ORDER. EVERYONE, REMAIN IN THE COURTROOM. AND
26 THE COURT WILL EXECUTE THE ORDER, WILL READ THE ORDER INTO THE

1 RECORD AND EXECUTE THE ORDER SHORTLY.

2 (WHEREUPON, A RECESS WAS TAKEN.)

3 THE COURT: THE RECORD SHALL REFLECT THAT THE COURT
4 HAS TAKEN SOME TIME TO REVISE ITS ORDER AND TO PREPARE A FINAL
5 ORDER CONCERNING THE MATTERS RELATING TO THIS HEARING TODAY.
6 THE COURT HAS READ AND CONSIDERED THE MOVING PARTIES AND THE
7 OPPOSITION PAPERS AND ARGUMENTS OF COUNSEL. AND I WANT TO
8 REITERATE THE FOLLOWING BECAUSE THE NOTICE AND TIMING OF
9 CERTAIN EVENTS ARE SIGNIFICANT.

10 WITH REGARD TO THE ORDER, ON NOVEMBER 19TH, 2018,
11 THIS COURT SET A BRIEFING SCHEDULE ON DEFENDANT FACEBOOK,
12 INC.'S EX PARTE APPLICATION FOR THE EXPEDITED BRIEFING ON A
13 MOTION FOR SANCTIONS AND CONTEMPT BY EMAIL.

14 ON NOVEMBER 20TH, 2018, THIS COURT ISSUED AN ORDER
15 FOR BRIEFING AND STAYING SUBMISSION OF UNREDACTED COPIES OF
16 SEALED DOCUMENTS.

17 ON NOVEMBER 26, THE COURT RECEIVED PLAINTIFF
18 SIX4THREE, LLC'S RESPONSE TO THE NOVEMBER 20TH ORDER AT
19 11:35 A.M., DEFENDANT'S EX PARTE AT 11:55 A.M., AND
20 PLAINTIFF'S "LIMITED RESPONSE" TO DEFENDANT'S EX PARTE AT
21 4:46 P.M.

22 ON NOVEMBER 27, 2018, THIS COURT ORDERED AN ORDER
23 AND NOTICE OF HEARING SETTING A HEARING FOR NOVEMBER 30, 2018,
24 AT 2:00 P.M.

25 ON NOVEMBER 28, 2018, THE COURT RECEIVED DEFENDANT'S
26 RESPONSE TO THE NOVEMBER 20TH ORDER AT 7:02 P.M. AND

1 PLAINTIFF'S RESPONSE TO DEFENDANT'S EX PARTE AT 7:06 P.M.

2 ON NOVEMBER 29TH, 2018, AT 2:31 P.M., MR. GODKIN
3 SENT A LETTER TO BOTH THE COURT AND THE PARTIES. A COPY OF
4 WHICH IS ATTACHED TO MY ORDER AS EXHIBIT A.

5 IT IS HEREBY ORDERED AS FOLLOWS:

6 DEFENDANT'S EX PARTE IS GRANTED, IN PART, AND
7 DENIED, WITHOUT PREJUDICE, IN PART.

8 DEFENDANT'S EX PARTE REQUEST FOR EXPEDITED BRIEFING
9 AND HEARING ON TERMINATING SANCTIONS AND CONTEMPT SANCTIONS IS
10 PROCEDURALLY IMPROPER. NOTICE MUST BE GIVEN PURSUANT TO CODE
11 OF CIVIL PROCEDURE SECTION 2023.030.

12 THE COURT, AFTER NOTICE TO ANY AFFECTED PARTY,
13 PERSON, OR ATTORNEY, AND AFTER OPPORTUNITY FOR HEARING, MAY
14 IMPOSE SANCTIONS AGAINST ANYONE ENGAGING IN CONDUCT THAT IS A
15 MISUSE OF THE DISCOVERY PROCESS. PURSUANT TO THE CASE OF
16 SOLE ENERGY CO. V. HODGES. THAT'S A 2005 CASE AT
17 128 CAL. APP. 4TH, 199 PINPOINT CITATION OF 208. DISCOVERY
18 SANCTIONS MAY NOT BE ORDERED EX PARTE, AND AN ORDER PURPORTING
19 TO DO SO IS VOID.

20 DEFENDANT'S EX PARTE REQUEST FOR EXPEDITED REQUESTS
21 FOR DOCUMENT PRODUCTION IS PROCEDURALLY IMPROPER. NO REQUESTS
22 HAVE BEEN SERVED ON PLAINTIFF AND THE RELIEF REQUESTED IS
23 PREMATURE. FURTHERMORE, A MOTION IS REQUIRED. NOW, PURSUANT
24 TO CODE OF CIVIL PROCEDURE SECTION 2031.260(A), THE RESPONSE
25 DEADLINE TO REQUESTS FOR PRODUCTION IS 30 DAYS UNLESS ON
26 MOTION OF THE PARTY MAKING THE DEMAND, THE COURT HAS SHORTENED

1 THE TIME FOR RESPONSE.

2 THERE ARE ALSO PROVISIONS SET FORTH IN WEIL & BROWN
3 WHICH ARE SECONDARY AUTHORITIES THAT ADDRESS THIS PROCEDURAL
4 ISSUE, AND I CITED THEM IN MY ORDER. HOWEVER, THE COURT MAY
5 ISSUE AN ORDER SHORTENING TIME PURSUANT TO EX PARTE
6 APPLICATION ON ANY SUCH MOTION. AND I'M GOING TO DO JUST
7 THAT.

8 THE DEFENDANT'S EX PARTE REQUEST TO SHORTEN NOTICES
9 OF DEPOSITION IS GRANTED TO FIVE DAYS UPON ELECTRONIC SERVICE
10 OR PERSONAL DELIVERY. THIS IS PURSUANT TO CODE OF CIVIL
11 PROCEDURE SECTION 2025.270(D). ALSO WEIL & BROWN AT
12 8:493.3. NOTICES OF DEPOSITION ON PARTIES MAY INCLUDE
13 REQUESTS FOR PRODUCTION. AND THAT'S PURSUANT TO CODE OF CIVIL
14 PROCEDURE SECTION 2025.220(A)(4).

15 DEFENDANT'S EX PARTE REQUEST TO REQUIRE DEPOSITIONS
16 OF PLAINTIFFS PRO HAC VICE COUNSEL IN SAN MATEO COUNTY IS
17 DENIED. AND THAT'S PURSUANT TO CODE OF CIVIL PROCEDURE
18 SECTION 2025.250(A).

19 IN RULING ON THE EX PARTE APPLICATION, THIS COURT
20 TAKES NO POSITION ON THE ISSUES OF THE WAIVER OF
21 ATTORNEY-CLIENT PRIVILEGE OR THE TAKING OF DEPOSITIONS OF ANY
22 OF PLAINTIFF'S COUNSEL AS THAT ISSUE IS NOT RIPE FOR REVIEW.
23 NOTICES OF DEPOSITION, REQUESTS FOR PRODUCTION, AND OBJECTIONS
24 HAVE YET TO BE SERVED.

25 THE COURT IMMEDIATELY ORDERS THAT PLAINTIFF'S
26 COUNSEL STUART GROSS OF GROSS & KLEIN SHALL UNMARK ALL FOLDERS

1 AND FILES MARKED FOR DELETION IN THE SIX4THREE DROPBOX ACCOUNT
2 TO PRESERVE ALL FILES AND FOLDERS. AFTER UNMARKING, MR. GROSS
3 SHALL THEN PROVIDE THE ADMINISTRATOR ACCESS LOG IN AND THE
4 PASSWORD TO THE THIRD PARTY FORENSIC EXAMINER AGREED TO ON THE
5 RECORD. ERIC FRIEDBERG OF STROZ FRIEDBERG, OR HIS AGENTS, AT
6 (212)981-6536 WHICH IS THE OFFICE OR (914)329-9371 WHICH IS
7 THE MOBILE, OR EFRIEDBERG@STROZFRIEDBERG.COM WHICH IS THE
8 EMAIL FOR THE FORENSIC EXAMINER.

9 UPON RECEIPT OF SAID INFORMATION, THE COURT
10 IMMEDIATELY ORDERS THE FORENSIC EXAMINER TO MAINTAIN CHAIN OF
11 CUSTODY, TAKE ALL MEASURES TO RESTRICT ACCESS TO, AND PRESERVE
12 THE DATA FROM THE SIX4THREE DROPBOX ACCOUNT, INCLUDING BUT NOT
13 LIMITED TO IMAGING, FOR PRESERVATION OF THE EVIDENCE UNTIL
14 FURTHER ORDER OF THIS COURT.

15 THE COURT IMMEDIATELY ORDERS THAT MR. THEODORE
16 KRAMER SHALL NOT OPEN OR ACCESS, IN ANY WAY, THE LAPTOP HE
17 USED TO ACCESS DEFENDANT'S HIGHLY CONFIDENTIAL DOCUMENTS AND
18 TRANSFER THOSE FILES TO THE USB THUMB-DRIVE TO PARLIAMENT
19 UNTIL FURTHER ORDER OF THE COURT.

20 THE COURT IMMEDIATELY ORDERS THAT MR. KRAMER SHALL
21 NOT OPEN, ACCESS, MODIFY, OR DELETE ANY STORAGE OR BACK-UP
22 DEVICES FOR HIS LAPTOP, WHETHER IN PHYSICAL FORMAT THAT IS TO
23 SAY PHYSICAL STORAGE DEVICES. FOR EXAMPLE, USB THUMB-DRIVE OR
24 IN THE CLOUD. FOR EXAMPLE, CLOUD STORAGE.

25 MR. KRAMER, TO BE ACCOMPANIED BY PLAINTIFFS' COUNSEL
26 DAVID GODKIN AND STUART GROSS, SHALL MAKE AVAILABLE FOR PICK

1 UP AT GROSS & KLEIN, THE EMBARCADERO, PIER 9, SUITE 100,
2 SAN FRANCISCO, CA 94111 - THE LAPTOP, ALL PHYSICAL STORAGE
3 DEVICES, IDENTIFY IN WRITING ALL CLOUD STORAGE, AND PROVIDE
4 ANY LOG-IN INFORMATION NECESSARY FOR THE FULL AND COMPLETE
5 ACCESS TO ALL DATA IN THE AFOREMENTIONED FORENSIC TO THE
6 FORENSIC EXAMINER NO LATER THAN FRIDAY, NOVEMBER 30TH, 2018,
7 AT 9:00 O'CLOCK P.M.

8 DEFENDANT'S COUNSEL ARE PERMITTED TO BE PRESENT FOR
9 THIS PICK UP. THE FORENSIC EXAMINER SHALL PICK UP, MAINTAIN
10 CHAIN OF CUSTODY, TAKE ALL MEASURES TO RESTRICT ACCESS TO, AND
11 PRESERVE THE DATA ON THE LAPTOP, ALL PHYSICAL STORAGE DEVICES,
12 AND CLOUD STORAGE, INCLUDING BUT NOT LIMITED TO IMAGING, FOR
13 PRESERVATION OF THE EVIDENCE UNTIL FURTHER ORDER OF THE COURT.

14 MR. KRAMER, TO BE ACCOMPANIED BY MR. GODKIN AND
15 MR. GROSS, SHALL MAKE HIS MOBILE DEVICES AVAILABLE AND PROVIDE
16 ANY LOG IN INFORMATION NECESSARY FOR THE FULL AND COMPLETE
17 ACCESS FOR PRESERVATION OF DATA ON THOSE DEVICES TO THE
18 FORENSIC EXAMINER AT GROSS & KLEIN NO LATER THAN FRIDAY,
19 NOVEMBER 30TH AT 9:00 O'CLOCK P.M.

20 THE FORENSIC EXAMINER SHALL TAKE ALL MEASURES TO
21 PRESERVE THE DATA ON THE MOBILE DEVICES, INCLUDING BUT NOT
22 LIMITED TO IMAGING, FOR PRESERVATION OF THE EVIDENCE UNTIL
23 FURTHER ORDER OF THIS COURT. DEFENDANT'S COUNSEL ARE
24 PERMITTED TO BE PRESENT FOR THIS DATA PRESERVATION BY THE
25 FORENSIC EXAMINER. UPON COMPLETION OF THE IMAGING OF THE
26 MOBILE DEVICES, THE FORENSIC EXAMINER SHALL RETURN THE MOBILE

1 DEVICES TO MR. KRAMER.

2 THE COURT ORDERS MR. KRAMER SHALL NOT DELETE ANY
3 DATA FROM HIS MOBILE DEVICES, WHATSOEVER, UNTIL FURTHER ORDER
4 OF THIS COURT. IF ANY OF HIS MOBILE DEVICES ARE SET TO
5 AUTOMATICALLY DELETE ANY DATA, THE COURT INSTRUCTS MR. KRAMER
6 TO TURN OFF THAT SETTING.

7 THE COURT IMMEDIATELY ORDERS THAT MR. THOMAS
8 SCARAMELLINO, WHO IS A MEMBER OF SIX4THREE'S LEGAL TEAM, SHALL
9 NOT OPEN OR ACCESS, IN ANY WAY, THE LAPTOP OR COMPUTER HE USED
10 TO ACCESS SIX4THREE'S DROPBOX AND THAT MR. SCARAMELLINO SHALL
11 NOT OPEN, ACCESS, MODIFY, OR DELETE ANY PHYSICAL STORAGE
12 DEVICES OR CLOUD STORAGE FROM HIS LAPTOP OR COMPUTER.

13 MR. SCARAMELLINO SHALL MAKE AVAILABLE FOR PICK UP AT
14 THE ADDRESS PROVIDED BY MR. GODKIN, 2674 STATE ROUTE 42,
15 FORESTBURGH, NY 12777 - THE LAPTOP OR COMPUTER, HIS PHYSICAL
16 STORAGE DEVICES, AND IDENTIFY IN WRITING ALL CLOUD STORAGE AND
17 PROVIDE ANY LOG IN INFORMATION NECESSARY FOR THE FULL AND
18 COMPLETE ACCESS TO ALL DATA IN THE AFOREMENTIONED TO THE
19 FORENSIC EXAMINER NO LATER THAN SATURDAY, DECEMBER 1ST, 2018,
20 AT 12:00 O'CLOCK P.M. THE FORENSIC EXAMINER SHALL PICK UP,
21 MAINTAIN CHAIN OF CUSTODY, TAKE ALL MEASURES TO RESTRICT
22 ACCESS TO, AND PRESERVE THE DATA ON THE LAPTOP OR COMPUTER,
23 MR. SCARAMELLINO'S PHYSICAL STORAGE DEVICES, AND
24 MR. SCARAMELLINO'S CLOUD STORAGE, INCLUDING BUT NOT LIMITED TO
25 IMAGING, FOR PRESERVATION OF THE EVIDENCE UNTIL FURTHER ORDER
26 OF THE COURT.

1 THE COURT ORDERS THAT THE FORENSIC EXAMINER SHALL
2 NOT DISCLOSE ANY DATA PRESERVED OR COLLECTED IN THIS ACTION TO
3 ANY PARTY, NON-PARTY, PERSON OR ENTITY, UNTIL FURTHER ORDER OF
4 THE COURT.

5 MR. KRAMER SHALL AUTHENTICATE AND PRODUCE FULL
6 COPIES OF THE EMAILS AND ATTACHMENTS HE PRODUCED AS
7 EXHIBITS TO HIS DECLARATION FILED IN SUPPORT OF PLAINTIFF'S
8 BRIEF IN RESPONSE TO THE NOVEMBER 20TH ORDER, FILED
9 NOVEMBER 26, 2018, TO DEFENDANT NO LATER THAN DECEMBER 1ST,
10 2018, AT 9:00 O'CLOCK A.M. THIS SHALL INCLUDE, BUT IS NOT
11 LIMITED, TO THE THREE ATTACHMENTS IN EXHIBIT 1 THAT IS QUOTE
12 "SUMMARY OF COMPLAINT.PDF," CLOSE QUOTE FILED CORRECTED
13 OPPOSITION TO INDIVIDUAL DEFENDANTS ANTI-SLAPP.PDF," CLOSE
14 QUOTE OR QUOTE "REQUESTS FOR PRODUCTIONSIX4THREE.PDF" CLOSE
15 QUOTE AND TEXT IDENTIFIED AS HIDDEN BY QUOTE "QUOTED TEXT
16 HIDDEN" CLOSE QUOTE AT EXHIBIT 2, PAGE 2 AND EXHIBIT 5,
17 PAGE 2. REFER TO THE DEFENSE RESPONSE TO THE NOVEMBER 20TH
18 ORDER AT PAGE 6, LINES 20 TO 21. THESE EMAILS AND ATTACHMENTS
19 SHALL BE BATES-STAMPED FOR EASE OF FUTURE REFERENCE FOR BOTH
20 PARTIES AND THE COURT.

21 THE PROVISION FOR PRESERVATION OF EVIDENCE IN THE
22 NOVEMBER 20TH ORDER REMAINS IN EFFECT AND IS ORDERED EXTENDED
23 TO APPLY TO ANY STORAGE OR BACK-UP DEVICES FOR ANY MOBILE
24 DEVICES, WHETHER IN PHYSICAL FORMAT OR IN THE CLOUD. FOR
25 EXAMPLE, THE ICLOUD.

26 GOOD CAUSE APPEARS TO ORDER PRESERVATION OF THE

1 AFOREMENTIONED BASED ON MR. KRAMER'S ADMITTED ACTIONS, THE
2 CLOUD CAST BY PLAINTIFF'S COUNSEL, COUNSEL'S CHANGE IN
3 NARRATIVE IN THE NOVEMBER 29TH LETTER, WHICH IS NOT SUPPORTED
4 BY COMPETENT EVIDENCE. PLAINTIFF'S COUNSEL'S ASSERTION THAT
5 QUOTE "IT DOES NOT APPEAR THAT MR. KRAMER'S DELETION OF LOCAL
6 COPIES OF THE DOCUMENTS FROM HIS COMPUTER WOULD AFFECT ANY
7 ELECTRONIC EVIDENCE OF HIS PROVISION OF DOCUMENTS, IF ANY
8 EXISTED. PERIOD. IT APPEARS THAT THIS INFORMATION, IF IT
9 EXISTED, WOULD BE CONTAINED IN THE SYSTEM LOG OF HIS LAPTOP."
10 PERIOD CLOSE QUOTE. THAT IS THE NOVEMBER 29TH LETTER AT
11 PAGE 2.

12 MR. KRAMER'S ADMISSION THAT HE QUOTE "DOES NOT
13 RECALL THE EXACT FILES THAT HE TRANSFERRED." CLOSE QUOTE.
14 THAT IS KRAMER'S DECLARATION IN SUPPORT OF PLAINTIFF'S
15 RESPONSE TO THE NOVEMBER 20TH ORDER, FILED NOVEMBER 26, 2018,
16 AT PAGE 5, LINES 23 TO 25. AND FOR THE MATTERS DISCUSSED ON
17 THE RECORD.

18 FOR DISCOVERY DISPUTES, THE PARTIES ARE REMINDED OF
19 THE DISCOVERY PROCEDURES SET FORTH IN THE CASE MANAGEMENT
20 ORDER NUMBER 1, PARAGRAPH 11. SEE THE CASE MANAGEMENT ORDER
21 14, PARAGRAPH 6. ANY REQUEST FOR A DISCOVERY CONFERENCE SHALL
22 BE DELIVERED TO DEPARTMENT 23 BOTH ELECTRONICALLY AND IN
23 PHYSICAL FORM.

24 PLAINTIFF'S COUNSEL SHALL REMAIN IN THIS ACTION
25 UNTIL FURTHER ORDER OF THE COURT.

26 MR. GODKIN SHALL IMMEDIATELY PROVIDE A COPY OF THIS

1 ORDER TO MR. SCARAMELLINO UPON RECEIPT.

2 LASTLY, THE COURT FINDS THAT ALTHOUGH THE SUMMARY OF
3 FACTS PRESENTED BY DEFENDANT IN ITS EX PARTE AND RESPONSE TO
4 THE NOVEMBER 20TH ORDER IS COMPELLING, IT IS NOT IN AFFIDAVIT
5 FORM. CODE OF CIVIL PROCEDURE SECTION 20 -- I'M SORRY. CODE
6 OF CIVIL PROCEDURE SECTION 1211(A) CONTROLS THAT PARTICULAR
7 COMMENT. AND YOU SHOULD SEE YOUR EX PARTE AT PAGE 2, LINES 24
8 TO 7, LINE 20. SO THAT'S PAGES 2, LINE 24 THROUGH PAGE 7,
9 LINE 20. AND THE DEFENSE RESPONSE TO THE NOVEMBER 20TH ORDER
10 AT PAGE 1, LINES 10 TO 4, LINE 5; PAGE 5, LINES 19 TO PAGE 6,
11 LINE 8; AND PAGE 9, LINES 3 TO PAGE 10:5. FINALLY, PAGE 10,
12 LINE 16 TO PAGE 11, LINE 14. I EXPECT PLAINTIFF AND THE
13 PLAINTIFF'S COUNSEL TO COOPERATE WITH THE EXPEDITED DISCOVERY.

14 FINALLY, THERE IS A PENDING MOTION FOR ATTORNEY'S
15 FEES THAT'S SCHEDULED FOR DECEMBER 7TH, 2018. THAT HEARING
16 SHALL BE CONTINUED TO JANUARY 11TH, 2019, AT 9:00 A.M. SO
17 THERE WILL BE NO DECEMBER 7 HEARING. THAT HEARING IS
18 CONTINUED TO JANUARY 11, 2019, AT 9:00 A.M.

19 IT IS SO ORDERED. THE COURT IS IN POSSESSION OF THE
20 ORDER THAT ITS JUST READ FROM. AND THE COURT IS EXECUTING
21 THIS ORDER IN OPEN COURT. IT IS SO ORDERED. AND I'M ALSO
22 ORDERING MY COURTROOM CLERK TO CONFORM THESE ORDERS AND FILE
23 STAMP AND ENDORSE SEPARATE COPIES FOR DELIVERY TO COUNSEL.

24 THE COURT CAN AND WILL MAKE ITSELF AVAILABLE FOR A
25 DISCOVERY -- I'M SORRY -- DISCOVERY. I'VE BEEN TALKING A LOT
26 TODAY, LADIES AND GENTLEMEN. AND MY SINCERE APOLOGIES. I

1 WILL MAKE MYSELF AVAILABLE FOR A DISCOVERY CONFERENCE ON
2 DECEMBER 7TH. AT THE TIME THAT WE WERE GOING TO HEAR THE
3 MOTIONS. THAT'S ABOUT AS EXPEDIENT AS I CAN BE. AND WE'RE
4 TAKING FULL ADVANTAGE OF THAT TIME WE'RE ALLOCATING TO THE
5 ATTORNEY'S FEES MOTIONS. IT IS SO ORDERED.

6 THANK YOU, EVERYONE. COUNSEL STAND BY FOR THE
7 DISTRIBUTION OF THE ORDERS THAT HAVE BEEN FILED ENDORSED. THE
8 COURT IS ALSO GOING TO POST A COPY OF THE ORDER THAT I JUST
9 READ FROM AND SIGNED ON THE DOOR. THANK YOU VERY MUCH FOR
10 YOUR ATTENTION AND PATIENCE, EVERYONE. COURT IS IN RECESS.

11 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

12 ---OOO---

1 STATE OF CALIFORNIA)

2) SS.

3 COUNTY OF SAN MATEO)

4 I, GERALDINE VANDEVELD, OFFICIAL COURT REPORTER,
5 COUNTY OF SAN MATEO, STATE OF CALIFORNIA, DO HEREBY CERTIFY:

6 THAT THE FOREGOING CONTAINS A TRUE, FULL AND CORRECT
7 TRANSCRIPT OF THE PROCEEDINGS GIVEN AND HAD IN THE
8 WITHIN-ENTITLED MATTER THAT WERE REPORTED BY ME AT THE TIME
9 AND PLACE MENTIONED AND THEREAFTER TRANSCRIBED BY ME OR AT MY
10 DIRECTION INTO LONGHAND TYPEWRITING AND THAT THE SAME IS A
11 CORRECT TRANSCRIPT OF THE PROCEEDINGS.

12 DATED: DECEMBER 3, 2018

13 

14
15 GERALDINE VANDEVELD, C.S.R. #8634
16 OFFICIAL COURT REPORTER
17
18
19
20
21
22
23
24
25
26

EXHIBIT 2

1 IN THE SUPERIOR COURTS OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN MATEO

3 ---000---

4
5 SIX4THREE LLC,

CERTIFIED TRANSCRIPT

6 PLAINTIFFS,

7 VS.

CASE NO. CIV533328

8 FACEBOOK, INC., ET AL.,

9 DEFENDANTS.

10 _____/

11
12 REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 BEFORE: HONORABLE V. RAYMOND SWOPE, JUDGE

14 DEPARTMENT 23

15 DECEMBER 7, 2018

16
17 A P P E A R A N C E S

18
19 FOR THE PLAINTIFFS: STUART G. GROSS
20 ATTORNEY AT LAW

21 DAVID S. GODKIN
22 ATTORNEY AT LAW

23 FOR THE DEFENDANTS: JOSH H. LERNER
24 ATTORNEY AT LAW

25 SONAL N. MEHTA
26 ATTORNEY AT LAW

REPORTED BY: GERALDINE VANDEVELD, C.S.R. 8634

P R O C E E D I N G S

REDWOOD CITY, CALIFORNIA

DECEMBER 7, 2018

--OOO--

THE COURT: GOOD MORNING, EVERYONE. CALLING CASE
NUMBER CIV533328. THE MATTER OF SIX4THREE, LLC VERSUS
FACEBOOK, INC., ET AL. WILL COUNSEL, PLEASE, STATE THEIR
APPEARANCES FOR THE RECORD.

MR. GODKIN: GOOD MORNING, YOUR HONOR. DAVID GODKIN
AND WITH ME IS JAMES KRUZER, COUNSEL OF RECORD FOR THE
PLAINTIFF.

THE COURT: GOOD MORNING.

MR. GROSS: GOOD MORNING, YOUR HONOR. STUART GROSS
LOCAL COUNSEL FOR PLAINTIFF.

THE COURT: GOOD MORNING.

MR. RUSSO: GOOD MORNING, YOUR HONOR. JACK RUSSO
AND CHRIS SARGENT FROM COMPUTERLAW GROUP FOR TED KRAMER.
MR. KRAMER, PLEASE STAND UP. AS WELL AS TOM SCARAMELLINO.

THE COURT: GOOD MORNING.

MR. SULLIVAN: GOOD MORNING, YOUR HONOR. DON
SULLIVAN FOR GROSS & KLEIN.

MR. MAZZUCCO: GOOD MORNING, YOUR HONOR. THOMAS
MAZZUCCO AND JOSEPH LEVERONI ON BEHALF OF MR. DAVID GODKIN AND
MR. JAMES KRUZER AND WE WENT INTO THE CASE YESTERDAY

1 AFTERNOON.

2 MS. MEHTA: GOOD MORNING, YOUR HONOR. SONAL MEHTA
3 FOR FACEBOOK. WITH ME ARE JOSH LERNER, LAURA MILLER,
4 CATHERINE KIM AND ZACHARY ABRAHAMSON. ALL OF DURIE TANGRI.
5 AND ON BEHALF OF FACEBOOK PAUL GREWAL, DEPUTY GENERAL COUNSEL
6 FOR LITIGATION.

7 MR. GREWAL: GOOD MORNING, YOUR HONOR.

8 THE COURT: GOOD MORNING TO EVERYONE. THIS MATTER
9 HAS BEEN SET FOR A DISCOVERY CONFERENCE AND ALSO A HEARING ON
10 THE EX PARTE APPLICATION THAT WAS FILED BY FACEBOOK RELATING
11 TO THE PROCEEDINGS OF NOVEMBER 30TH, 2018.

12 THE FIRST ISSUE THAT I WANT TO CLEAR UP BEFORE I
13 BEGIN TO HEAR THE ARGUMENTS ON THE EX PARTE APPLICATION BY
14 FACEBOOK IS THAT ON DECEMBER 5TH, 2018, THE COURT RECEIVED A
15 REDACTED VERSION AND AN UNREDACTED VERSION OF THE DEFENDANT'S
16 DISCOVERY LETTER BRIEF.

17 IT IS THE COURT'S UNDERSTANDING THAT THE UNREDACTED
18 VERSION INCLUDES CONFIDENTIAL SETTLEMENT DISCUSSIONS WHICH IS
19 IMPROPER. IT VIOLATES EVIDENCE CODE SECTION 1152. THE COURT
20 HAS ONLY READ AND REVIEWED THE REDACTED VERSION, AND I HAVE
21 NOT SEEN THE UNREDACTED VERSION.

22 SO COUNSEL FOR FACEBOOK IS ADMONISHED FOR IT
23 INCLUDING THIS CONFIDENTIAL SETTLEMENT DISCUSSION IN ITS PAPER
24 TO THE COURT. IT'S NOT PROPER BUT NEVERTHELESS I HAVEN'T SEEN
25 IT. AND I HAVE NOT READ THAT VERSION OF THE LETTER. THAT MAY
26 ALLAY SOME OF THE CONCERNS OF COUNSEL IN RELATION TO THE

1 CONFIDENTIAL NATURE OF THE COMMUNICATIONS. AND I DON'T KNOW
2 THEM. ALL RIGHT. OKAY.

3 I DO HAVE SOME QUESTIONS OF COUNSEL GENERALLY. AND
4 I THINK THEY HAVE BEEN ANSWERED AT LEAST ONE OF MY INITIAL
5 QUESTIONS WHICH IS WHAT IS THE STATUS OF RETAINING CALIFORNIA
6 COUNSEL FOR MR. GROSS AND MR. GODKIN AND MR. KRUZER. ALL OF
7 YOU HAVE APPEARED TODAY. SO IF YOU DON'T MIND, I HAVE SOME
8 QUESTIONS FOR MR. GROSS. AND THESE ARE ADMINISTRATIVE
9 QUESTIONS FRANKLY. MR. GROSS, DID YOU UNCHECK THE BOXES TO
10 KEEP THE FILES AND FOLDERS FROM BEING DELETED FROM THE
11 SIX4THREE DROPBOX ACCOUNT AS DIRECTED TO DO SO IMMEDIATELY
12 AFTER THE HEARING?

13 MR. GROSS: I APOLOGIZE, YOUR HONOR.

14 THE COURT: YES.

15 MR. GROSS: I DID, YOUR HONOR. THERE WERE -- THERE
16 WERE THREE FOLDERS WHICH DID NOT SHOW UP AS UNDELETED. SO I
17 CHECKED AGAIN ON SATURDAY, TRIED AGAIN ON SATURDAY. I THEN
18 INFORMED COUNSEL FOR FACEBOOK OF THE SITUATION ON SUNDAY. AT
19 THAT POINT THEN THE LOG-IN INFORMATION OF THE DROPBOX ACCOUNT
20 WAS CHANGED, AND I WAS NOT ABLE TO GET BACK ON. SEVERAL TIMES
21 I REQUESTED THAT THE FORENSIC EXAMINER DO WHAT'S NECESSARY TO
22 GET THOSE ADDITIONAL THREE FOLDERS UNMARKED.

23 I -- WE HAD SOME COMMUNICATION LAST NIGHT THAT
24 APPARENTLY THE FORENSIC EXAMINER IS GOING TO MAKE A COPY OF
25 EVERYTHING AND THEN IS GOING TO REACH OUT TO ME ABOUT THIS. I
26 DON'T KNOW IF THAT STRATEGY WILL WORK. THIS IS GOING BEYOND

1 WHAT I UNDERSTAND IN TERMS OF THE TECHNOLOGY, SO I UNCHECKED
2 EVERYTHING AND WAS ABOUT TO MOVE TO THE NEXT STEP OF ENLISTING
3 TECHNICAL SUPPORT, IF NEEDED, TO DO THE -- TO EXECUTE FOR THE
4 LAST THREE FOLDERS, BUT I WAS NOT ABLE TO DO THAT FURTHER ON
5 SUNDAY. I'VE BROUGHT THIS TO DEFENDANTS' COUNSEL SEVERAL
6 TIMES.

7 THE COURT: OKAY. WHEN DID YOU ATTEMPT TO ACCESS
8 THE SIX4THREE DROPBOX ACCOUNT?

9 MR. GROSS: SO THAT WAS IMMEDIATELY AFTER THE
10 HEARING, YOUR HONOR. SO WE WENT BACK TO MY OFFICE AND THAT'S
11 WHERE I UNCHECKED ALL OF -- I CLICKED "RESTORE" IS WHAT IT IS
12 TO BE PERFECTLY ACCURATE. AND I ALSO AS A REDUNDANCY HAD
13 MR. KRAMER WHO IS STILL -- HE'S THE ONLY PERSON WHO COULD
14 CONTACT DROPBOX. HE IS THE OWNER OF THE ACCOUNT, SEND A
15 REQUEST. AN ADDITIONAL REQUEST IN ANOTHER NAME THAT IS
16 DUPLICATIVE PLEASE UNDELETE REQUEST.

17 AND THAT'S WHAT I WAS INTENDING TO DO ON SUNDAY WAS
18 REACH BACK OUT TO TECHNICAL SUPPORT AND SEE WHAT WAS GOING ON
19 WITH THESE THREE FOLDERS. I KNOW THAT SOMETIMES THERE COULD
20 BE A DELAY WITH HOW DROPBOX OPERATES, SO I DON'T KNOW JUST TO
21 BE CLEAR, YOUR HONOR, IF THOSE THREE FOLDERS REMAIN MARKED FOR
22 DELETION BECAUSE I HAVEN'T BEEN ABLE TO ACCESS THE ACCOUNT.

23 THE COURT: ALL RIGHT. JUMPING AHEAD, I HAVE SOME
24 QUESTIONS FOR MR. RUSSO. AND, FRANKLY, THERE ARE QUESTIONS
25 THAT ARE REALLY IN RESPONSE TO THE MOVING PAPERS OF FACEBOOK.
26 AND THERE MAY BE A WAY OF HEADING OFF SOME CONCERNS THAT YOU

1 MAY HAVE, MR. RUSSO, ON BEHALF OF YOUR CLIENTS. AND PERHAPS
2 WE COULD DISCUSS THIS RIGHT NOW.

3 NOW, A LOT OF THIS DISCOVERY HAS TAKEN PLACE BECAUSE
4 OF CONCERNS OF THE BREACHES OF CONFIDENTIALITY WITH REGARD TO
5 TWO ORDERS. ONE WHICH IS THE PROTECTIVE ORDER BACK IN 2016
6 THAT WAS ISSUED BEFORE THIS COURT ASSUMED RESPONSIBILITY FOR
7 THIS CASE. AND THEN, SECOND, THE ORDER OF SEALING THAT IS THE
8 NOTICE TO SEAL ORDER THAT I ISSUED IN NOVEMBER JUST LAST
9 MONTH. THAT MOTION TO SEAL WAS THE PRODUCT OF A PAINSTAKING
10 REVIEW OF ALL THE DOCUMENTS AND THEIR RELEVANCE TO THE CASE AT
11 BAR. THOSE DOCUMENTS THAT HAD NO RELEVANCE WERE SEALED
12 ESSENTIALLY.

13 AND THAT IS THE REASON THAT THE COURT UNDERTOOK THAT
14 RESPONSIBILITY AND CERTAINLY COUNSEL INVOLVED IN THAT
15 DISCUSSION IN THAT HEARING CAN CHIME IN WITH REGARD TO WHAT
16 HAD HAPPENED DURING THE COURSE OF THE PREVIOUS HEARING
17 RESULTED IN THE SEALING MOTION THAT I ISSUED.

18 SO THE REQUESTS BY FACEBOOK ARE ON THE FRINGES OF
19 ATTORNEY/CLIENT PRIVILEGE. AND THERE ARE ALSO SOME ISSUES
20 CONCERNING THE ARTICLE 1, SECTION 1 PRIVACY PROTECTIONS OF
21 EACH OF THE PARTIES OR EACH OF THE EMPLOYEES OR THE PRINCIPAL
22 PLAINTIFF IN THIS CASE MR. KRAMER. AND I HESITATE TO
23 REFERENCE MR. SCARAMELLINO AS AN EMPLOYEE OF MR. GODKIN'S
24 FIRM, BUT HE'S A MEMBER OF THE LEGAL TEAM AS I UNDERSTAND IT.

25 THE COURT HAS OBSERVED THAT FACEBOOK WISHES TO
26 OBTAIN GMAIL INFORMATION, WHICH I BELIEVE MY COURT ORDER

1 REALLY INTENDED TO INCLUDE THAT AND I'M GOING TO CLARIFY THAT
2 ORDER TODAY WITH REGARD TO THAT INFORMATION. HOWEVER, THERE
3 IS THE CONCERN OF PRIVACY IN ATTORNEY/CLIENT PRIVILEGE.

4 HAVING REVIEWED THE PAPERS OF MR. KRAMER AND
5 MR. SCARAMELLINO THAT YOU AUTHORED, MR. RUSSO, THE QUESTION IS
6 THE INDEPENDENCE OF THE FORENSIC EXPERT, I BELIEVE. THAT'S
7 ONE OF THE QUESTIONS.

8 MR. RUSSO: THAT'S ONE OF THEM, YOUR HONOR.

9 THE COURT: AND THERE SHOULD BE SAFEGUARDS WITH
10 REGARD TO THE CONFIDENTIALITY OF EACH OF THE PARTIES
11 COMMUNICATIONS THAT HAVE NOTHING TO DO WITH THIS CASE.

12 MR. RUSSO: AND IT'S PROBLEMATIC FOR THREE REASONS,
13 YOUR HONOR.

14 THE COURT: YES.

15 MR. RUSSO: THE FIRST IS THAT MR. SCARAMELLINO IS A
16 LAWYER. HE'S ACTUALLY PASSED THE BAR HERE IN CALIFORNIA,
17 PASSED THE ETHICS EXAM. HE'S A LAW GRADUATE. HE'S PART OF
18 THE LEGAL TEAM. HE'S GOT WORK PRODUCT AS WELL BEYOND
19 ATTORNEY/CLIENT PRIVILEGE COMMUNICATIONS. HE'S GOT ACTUAL
20 WORK PRODUCT THAT IS ABSOLUTELY PROTECTED ON THAT ACCOUNT AND
21 ON THE GMAIL.

22 WE HAVE BEEN IN THIS CASE FOR 72 HOURS, YOUR HONOR.
23 WE LITERALLY SPENT A LOT OF TIME TRYING TO RUSH TO GET UP TO
24 SPEED. COUNSEL ASKED US PLEASE DO THAT. RESPECTFULLY WE SAID
25 WE WILL DO OUR BEST AND WE ACTUALLY SENT A LETTER SAYING IF
26 YOUR HONOR ALLOWS DEPOSITIONS TO HAPPEN, WE WILL MAKE THEM

1 AVAILABLE, IF THAT'S APPROPRIATE.

2 BUT YOU'RE IDENTIFYING THE EXACT ISSUES WHICH IS
3 ATTORNEY/CLIENT PRIVILEGE, WORK PRODUCT PROTECTION. AND, YOU
4 KNOW, THERE'S A BUSINESS AND PROFESSIONS CODE 6068(E). I KNOW
5 YOUR HONOR IS FAMILIAR WITH THAT SAYS A LAWYER OR A MEMBER OF
6 A LEGAL TEAM HAS TO KEEP SECRET CLIENT SECRETS. MR. KRAMER IS
7 THE CEO AND MANAGING DIRECTOR OF THE COMPANY. THE COMPANY HAS
8 ITS OWN SET OF INFORMATION THAT REPRESENTS, ALBEIT NOW THE
9 COMPANY IS DEFUNCT, ITS PROPERTY. HE HAS TO RESPECT THOSE
10 RIGHTS AS A MEMBER OF THE LEGAL TEAM, AS I'M SURE ALL THE
11 OTHER LAWYERS THAT ARE HERE WILL AFFIRM.

12 SO THIS IDEA OF GRABBING WHAT IS 12 YEARS OF GMAIL,
13 AS I UNDERSTAND IT, THAT MR. SCARAMELLINO HAS ATTORNEY WORK
14 PRODUCT, ATTORNEY CLIENT PRIVILEGE, SECRET INFORMATION. HE IS
15 MARRIED. HE HAS BEEN MARRIED FOR A NUMBER OF YEARS. HE HAS A
16 FAMILY. HE HAS ALL SORTS OF MEDICAL INFORMATION IN THAT GMAIL
17 ACCOUNT. HE'S GOT ALL SORTS OF SPOUSAL COMMUNICATIONS IN THAT
18 ACCOUNT. WE DON'T THINK CAPTURING THAT WHOLE ACCOUNT MAKES A
19 LOT OF SENSE, NOT 12 YEARS. THIS CASE HASN'T GONE ON THAT
20 LONG YET.

21 THE COURT: NO. I UNDERSTAND THAT, MR. RUSSO. AND
22 YOU RAISE VALID CONSIDERATIONS. I THINK THAT REQUEST OR THAT
23 SCOPE IS OVERLYBROAD. IF THE SCOPE OF THAT INQUIRY WERE
24 LIMITED TO NOVEMBER 1ST OF 2017 TO THE PRESENT AND IF THERE
25 WAS A MECHANISM TO SCREEN THOSE CONFIDENTIAL MATTERS THAT ARE
26 IRRELEVANT TO THIS CASE AND ALL PERSONAL COMMUNICATIONS THAT

1 OCCURRED OUTSIDE OF THE SCOPE OF THIS CASE, WOULD THAT BE
2 SOMETHING THAT WOULD BE ACCEPTABLE TO YOUR CLIENTS, MR. RUSSO?

3 MR. RUSSO: IN GENERAL, YOUR HONOR, I THINK THE
4 ACTUAL RELEVANT PERIOD MIGHT BE NOVEMBER OF 2018 WHICH IS WHEN
5 THIS CONTROVERSY -- THE CONTROVERSY THAT'S UNDER INSPECTION
6 NOW, AS I UNDERSTAND IT, ALL AROSE FROM COMMUNICATIONS THAT
7 BEGAN ROUGHLY NOVEMBER 1, AS BEST I CAN DETERMINE. BUT,
8 AGAIN, 72 HOURS IS NOT A LOT OF TIME. AND OBVIOUSLY THERE
9 WERE SOME SLEEP IN THOSE THREE DAYS AS WELL. IT'S NOT REALLY
10 72 WORKING HOURS.

11 THE COURT: THERE WERE SOME DECLARATIONS THAT HAD
12 BEEN FILED INDICATING THAT COMMUNICATIONS HAD BEEN MAINTAINED
13 BY ONE OF YOUR CLIENTS MR. KRAMER AND THE PRESS IN RELATION TO
14 THIS INFORMATION BACK IN MAY OF 2018.

15 MR. RUSSO: I HAVE NOT SEEN IT, BUT I DON'T DOUBT
16 THAT IT'S TRUE. I DON'T DOUBT THAT THERE WAS INTERACTION WITH
17 THE PRESS BECAUSE THE CASE IS PRESS WORTHY.

18 THE COURT: FURTHER, THERE WAS A DECLARATION OR
19 WITHIN THE DECLARATION THAT I'M REFERRING TO, THERE WAS A
20 REFERENCE TO FURTHER COMMUNICATIONS WITH THE PRESS AND AN
21 INVITATION TO COMMUNICATE WITH THE HOUSE OF COMMONS A MEMBER
22 OF PARLIAMENT MR. DAMIAN COLLINS IN AUGUST. SO NOVEMBER IS
23 NOT REALLY A HARD AND FAST DATE THAT WOULD BE APPROPRIATE
24 GIVEN THAT THERE WERE BEGINNINGS OF THIS BACK IN THE SUMMER.

25 MR. RUSSO: YOUR HONOR, YOU HAVE BETTER HANDLE ON
26 THIS CASE THAN I DO FOR SURE. I THINK THE ACTUAL CHAIN OF

1 EVENTS IS A LITTLE DIFFERENT THAN DESCRIBED, AS BEST AS I
2 UNDERSTAND THEM. BUT AT THE END OF THE DAY YOU'RE RIGHT
3 MR. KRAMER WAS SERVED WITH A PARLIAMENTARY ORDER THAT THEN
4 RESULTED IN A CONTEMPT NOTICE TO HIM THAT THEN RESULTED IN HIM
5 TURNING INFORMATION OVER. THERE'S NO DISPUTE AS TO THOSE
6 FACTS.

7 NOW, HOW DO WE SOLVE THE PROBLEM? I MEAN IF THERE
8 IS A SOLUTION? I'M ALL EARS. I'M TRYING TO FIGURE IT OUT.

9 THE COURT: RIGHT. WELL, I BELIEVE, IF I'M NOT
10 MISTAKEN, FACEBOOK HAS INQUIRED AS TO HOW ALL OF THESE THINGS
11 CULMINATED. WHEN DID THE PLAN TO DISCLOSE THIS CONFIDENTIAL
12 INFORMATION BEGIN? THAT'S WHAT FACEBOOK IS INQUIRING ON.
13 THAT'S WHAT THIS COURT WANTS TO KNOW.

14 MR. RUSSO: RIGHT. AND I WOULD SAY, YOUR HONOR,
15 THAT THERE WAS NO PLAN. I BELIEVE WHAT MY CLIENTS HAVE TOLD
16 ME THAT IF THEY WERE SUBJECT -- OR NOT THEY -- MR. KRAMER WAS
17 SUBJECT TO CIRCUMSTANCES THAT TOOK HIM COMPLETELY BY SURPRISE.
18 I KNOW THAT'S DISPUTED. AND I KNOW WE'RE GOING TO HAVE SOME
19 TYPE OF INQUIRY HERE. MAYBE, IN FACT, A SEPARATE TRIAL
20 ASSUMING YOUR HONOR ALLOWS IT WHERE HE IS HEARD AND HE
21 EXPLAINS EXACTLY WHAT HAPPENS UNDER OATH.

22 I THINK HE'S ALREADY DONE THAT IN ONE DECLARATION
23 THAT'S BEEN SUBMITTED TO YOU. I KNOW THAT I HAVE
24 CROSS-EXAMINED HIM ABOUT THAT. AND HE CREDIBLY INFORMS ME OF
25 CIRCUMSTANCES THAT WERE BEYOND HIS CONTROL. I THINK YOUR
26 HONOR WILL MAKE THAT DETERMINATION. I HAVEN'T ASKED COUNSEL

1 FOR FACEBOOK WHAT IS THE END GAME HERE? WHAT IS THE PURPOSE
2 OF THIS? IS IT TO PUNISH MR. KRAMER FOR AN INADVERTENT
3 MISTAKE OR A NEGLIGENT MISTAKE OR IS IT SOME BROADER PURPOSE?
4 I DON'T KNOW, BUT I DO KNOW AS WE SIT HERE TODAY WE ARE FULLY
5 COOPERATIVE. WE WANT TO FIGURE OUT WHAT A SOLUTION IS. AND
6 WE WANT TO FIGURE OUT A WAY TO GET THERE QUICKLY WITHOUT
7 SPENDING A FORTUNE IN TIME AND MONEY. NO QUESTION ABOUT ALL
8 THOSE THINGS.

9 THE COURT: I UNDERSTAND. WITH REGARD TO THE
10 FORENSIC EXAMINER AND THE LACK OF INDEPENDENCE, THE COURT MAY
11 HAVE A SOLUTION TO THAT ISSUE BECAUSE I BELIEVE THAT IF THERE
12 IS AN INDEPENDENT FORENSIC EXAMINER, THAT EXAMINER CAN AT THE
13 DIRECTION OF THE COURT OR STIPULATION OF THE PARTIES GLEAN OUT
14 THE CONFIDENTIAL OR PRIVATE COMMUNICATIONS THAT HAVE NOTHING
15 TO DO WITH THIS CASE. AND, ALSO, RETAIN THAT INFORMATION
16 UNTIL FURTHER ORDER OF THE COURT. WOULD THAT BE SOMETHING
17 THAT WOULD BE SATISFACTORY TO YOU OR YOUR CLIENTS?

18 MR. RUSSO: I'M SURE, YOUR HONOR, SO LONG THE
19 APPROPRIATE CONSTRAINTS RESPECTING THE ATTORNEY/CLIENT,
20 ATTORNEY WORK PRODUCT SECRET INFORMATION, SPOUSAL PRIVILEGE
21 INFORMATION, PRIVATE INFORMATION. IF ALL THOSE THINGS ARE
22 FACTORED IN, ABSOLUTELY.

23 THE COURT: ALL RIGHT. MS. MEHTA, YOU HEARD MY
24 QUESTIONS TO MR. RUSSO CONCERNING THE USE OF THE FORENSIC
25 EXAMINER AND ALSO THE PRIVACY AND THE ATTORNEY/CLIENT --
26 ATTORNEY/CLIENT WORK PRODUCT CONCERNS THAT HE HAS.

1 MS. MEHTA: YES. YES, YOUR HONOR, WE HAVE. JUST A
2 COUPLE OF THINGS IN TERMS OF RECAPPING WHERE WE ARE TO HELP
3 FRAME THOSE TWO QUESTIONS. THE FIRST THING IS THERE'S A
4 SUGGESTION FROM MR. RUSSO THAT ALL OF THIS STARTED WHEN
5 MR. KRAMER WAS IN THE UNITED KINGDOM IN NOVEMBER. AND AS YOUR
6 HONOR POINTED OUT, THE QUESTION REALLY IS WHAT IS THE
7 APPROPRIATE TIMEFRAME THAT WE'RE LOOKING AT.

8 WHAT WE WOULD DIRECT YOUR HONOR TO IS WHAT THE
9 RECORD IN THIS CASE SHOWS IS THAT THIS IS SOMETHING THAT HAS
10 BEEN IN THE WORKS FOR A LONG TIME OR AT LEAST THAT
11 MR. SCARAMELLINO AND MR. KRAMER AND THE LEGAL TEAM HAVE BEEN
12 INVOLVED IN THIRD PARTY COMMUNICATIONS RELATING TO THIS CASE
13 FOR LONG BEFORE NOVEMBER OF 2018.

14 THERE'S A PRIVILEGE LAW THAT WAS SERVED BY COUNSEL
15 FOR SIX4THREE IN WHICH MR. SCARAMELLINO'S GMAIL ACCOUNT
16 APPEARS REPEATEDLY ON COMMUNICATIONS WITH THIRD PARTIES ABOUT
17 THIS CASE RELATING TO THIS CASE.

18 THOSE COMMUNICATIONS DATE BACK TO THE BEGINNING OF
19 2017. FEBRUARY 2017 IS THE DATE THAT I'M LOOKING AT. THERE
20 MAY BE A DATE EARLIER THAN THAT. FROM THE BEGINNING OF 2017,
21 MR. SCARAMELLINO AND THE LEGAL TEAM HAVE BEEN REACHING OUT TO
22 THIRD PARTIES TO TALK ABOUT THIS CASE. THE INQUIRY THAT IS
23 BEFORE THE COURT IS WHAT IS THE SCOPE AND THE EXTENT OF THE
24 DISCLOSURE OF FACEBOOK'S CONFIDENTIAL INFORMATION?

25 WE KNOW THAT MR. KRAMER LEAKED THIS MATERIAL TO THE
26 DCMS COMMITTEE IN NOVEMBER. BUT THAT WAS THE FINAL STEP IN

1 THE VIOLATION OF THE COURT'S ORDERS. THE QUESTION IS WHAT WAS
2 THE FIRST STEP? AND THE REASON THAT WE HAVE TO AT LEAST
3 SUSPECT THAT THIS WAS ALL IN THE WORKS FOR A LONG TIME ARE NOT
4 ONLY THOSE COMMUNICATIONS WITH NUMEROUS THIRD PARTIES.
5 LITERALLY DOZENS OF THIRD PARTIES INVOLVING THIS CASE.

6 BUT ALSO THE STEPS THAT MR. GODKIN TOOK TO
7 DEDESIGNATE INFORMATION THAT TO MAKE IT AVAILABLE TO
8 MR. KRAMER AND TO MR. SCARAMELLINO. IN 2017, THERE WAS A
9 DISPUTE AS TO THE CONFIDENTIALITY DESIGNATION PROVIDED ON
10 FACEBOOK DOCUMENTS THAT INCLUDED NUMEROUS THIRD PARTY
11 DEVELOPERS. AND AT THAT TIME -- THIS IS IN AUGUST OF 2017.
12 AT THAT TIME, MR. GODKIN ARGUED TO JUDGE WEINER THAT HIGHLY
13 CONFIDENTIAL INFORMATION SHOULD BE DEDESIGNATED TO
14 CONFIDENTIAL WHICH WOULD GIVE MR. KRAMER ACCESS TO IT.

15 AND HE LITERALLY SAID ON THE TRANSCRIPT OF THE
16 AUGUST 16TH, 2017, HEARING AT PAGE 49, LINES 10 THROUGH 13,
17 "THERE'S NO HARM IN GIVING FACEBOOK THIS INFORMATION BECAUSE"
18 -- AND THIS IS WHAT HE SAID -- "IT'S NOT LIKE WE'RE ASKING FOR
19 IT TO BE PUBLISHED IN THE NEW YORK TIMES."

20 SINCE 2017, THEY HAVE BEEN WORKING TO GET HIGHLY
21 CONFIDENTIAL INFORMATION IN THE HANDS OF MR. KRAMER AND
22 MR. SCARAMELLINO.

23 THE COURT: I'M SORRY. LET ME STOP YOU THERE. YOU
24 SAID THAT "THERE'S NO HARM IN GIVING FACEBOOK THIS
25 INFORMATION"?

26 MS. MEHTA: SORRY. DEDESIGNATING THIS INFORMATION

1 BECAUSE IT'S NOT LIKE WE'RE ASKING IT TO GO TO THE NEW YORK
2 TIMES. SO IN 2017, THEY WERE COMMUNICATING WITH NUMEROUS
3 THIRD PARTIES ABOUT THIS CASE. DOZENS OF THIRD PARTIES ABOUT
4 THIS CASE. THEY WERE ASKING FOR CONFIDENTIAL INFORMATION TO
5 GO FROM A HIGHLY CONFIDENTIAL DESIGNATION TO A CONFIDENTIAL
6 DESIGNATION WHICH WOULD LET MR. KRAMER AND MR. SCARAMELLINO
7 HAVE ACCESS TO IT.

8 AND THEN THROUGHOUT 2018, THEY WERE PUTTING THINGS
9 INTO THE RECORD AND THEN SEEKING TO HAVE THEM UNSEALED. WHEN
10 DID THIS BEGIN? WE DON'T KNOW, BUT IT CERTAINLY DIDN'T BEGIN
11 ON NOVEMBER 1ST, 2018. THIS IS SOMETHING THAT HAS BEEN IN THE
12 WORKS FOR AT LEAST SINCE THE BEGINNING OF 2017.

13 THE COURT: AS I UNDERSTAND THIS CASE, THERE ARE
14 CONFIDENTIAL MATTERS THAT -- AT LEAST IN EUROPE THEY ARE NO
15 LONGER CONFIDENTIAL -- THAT WERE ORDERED SEALED. AND THEY
16 WERE PART OF THE LITIGATION. THAT LITIGATION INVOLVES
17 SIX4THREE'S PROSECUTION OF THEIR CLAIM AGAINST FACEBOOK AND
18 THAT NECESSITATED THE UTILIZATION OF INFORMATION. SOME OF
19 WHICH WAS CONFIDENTIAL. AND THAT CONFIDENTIAL INFORMATION WAS
20 FOR THE ATTORNEY'S EYES ONLY AND TO BE KEPT WITHIN THE FOUR
21 CORNERS OF THIS LAWSUIT; IS THAT CORRECT?

22 MS. MEHTA: THAT'S CORRECT, YOUR HONOR.

23 THE COURT: AND THAT INFORMATION CONFIDENTIAL IN
24 NATURE WAS LIMITED TO THIS LAWSUIT, RIGHT?

25 MS. MEHTA: THAT'S CORRECT.

26 THE COURT: THERE WAS NO NEED TO HAVE THAT

1 INFORMATION OUT IN THE PUBLIC DOMAIN BECAUSE ITS PARTICULAR TO
2 THIS LAWSUIT AND IT WAS UNDER SEAL. AND PURSUANT TO A
3 PROTECTIVE ORDER, CORRECT?

4 MS. MEHTA: THAT'S ABSOLUTELY CORRECT, YOUR HONOR.
5 AND THE QUESTION IS WHEN DID THE FOLKS ON THE OTHER SIDE?
6 WHETHER IT BE MR. KRAMER, MR. SCARAMELLINO, THE LAWYERS.
7 EXACTLY WHO AND TO WHAT EXTENT WAS THE PLAN THAT INFORMATION
8 THAT WAS CONFIDENTIAL OR HIGHLY CONFIDENTIAL COULD BE USED FOR
9 OR ULTERIOR PURPOSES BEYOND THE LITIGATION OF THIS DISPUTE
10 BEFORE THIS COURT. AND GIVEN ALL THE THIRD PARTY
11 COMMUNICATION ON THEIR PRIVILEGE LOG, GIVEN THE FACT THAT THEY
12 WERE AFFIRMATIVELY WORKING TO DEDESIGNATE INFORMATION THAT IT
13 COULD GO INTO MR. KRAMER'S HANDS, THERE IS A STRONG REASON TO
14 BELIEVE THAT THIS PLOT WAS HATCHED LONG BEFORE MR. KRAMER'S
15 CONVENIENT TRIP TO THE UNITED KINGDOM.

16 ESPECIALLY WHEN YOU COUPLE THAT WITH THE FACT THAT
17 HE WAS TELLING PEOPLE IN MAY OF THIS YEAR THAT HE HAD
18 CONFIDENTIAL INFORMATION IN HIS POSSESSION IN THE CLOUD. AND
19 THEN WORKED OVER THE COURSE OF WEEKS WITH THE DCMS COMMITTEE
20 TO GENERATE THOSE ORDERS.

21 WE NEED TO GET TO THE BOTTOM. AND RESPECTFULLY,
22 YOUR HONOR, YOU NEED TO GET TO THE BOTTOM OF WHEN DID THIS ALL
23 START? WHO WAS INVOLVED? AND TO WHAT EXTENT BECAUSE YOUR
24 HONOR NEEDS TO KNOW AND FACEBOOK NEEDS TO KNOW WHAT EXACTLY IS
25 OUT THERE? WHO MIGHT HAVE IT? WHAT REMEDIAL MEASURES SHOULD
26 BE TAKEN? AND WHAT APPROPRIATE SANCTIONS SHOULD ISSUE?

1 AT THIS POINT, MR. KRAMER, SIX4THREE AND THE LEGAL
2 TEAM ARE NOT ABLE TO TELL YOUR HONOR OR FACEBOOK WHO HAS
3 CONFIDENTIAL INFORMATION OR WHAT INFORMATION THEY HAVE. WE
4 LITERALLY DON'T KNOW WHAT INFORMATION IS OUT THERE. WE HAVE
5 250 PAGES FROM MR. GODKIN'S DECLARATION AND THE EXHIBITS THAT
6 WE KNOW ARE PUBLIC BECAUSE THEY WERE PUBLISHED BY THE U.K.
7 PARLIAMENTARY COMMITTEE THIS WEEK. AND THERE'S BEEN AMPLE
8 NEWS COVERAGE ABOUT THEM. WE KNOW ABOUT THOSE 250 PAGES.

9 BUT MR. KRAMER WHO PROVIDED THE DOCUMENTS CAN'T TELL
10 US WHAT ELSE IS OUT THERE? WHO ELSE MIGHT HAVE IT. AND
11 MR. SCARAMELLINO WHO PROVIDED THE DOCUMENTS TO MR. KRAMER IN
12 VIOLATION OF THE PROTECTIVE ORDER, WE HAVE NO IDEA WHAT HE WAS
13 SAYING TO THE DOZENS OF THIRD PARTIES THAT HE WAS TALKING TO
14 ABOUT THIS CASE. WHAT MEMBERS OF THE PRESS OR THE MEDIA HE
15 MIGHT HAVE BEEN TALKING TO. WHAT OTHER GOVERNMENT AGENCIES
16 THEY WERE TALKING TO.

17 THERE'S SO MANY OPEN QUESTIONS HERE. AND UNTIL WE
18 GET THE BASIC DISCOVERY TO UNDERSTAND WHAT HAS HAPPENED, ON
19 WHAT TIMELINE AND WHO WAS INVOLVED, WE WON'T KNOW WHAT THE
20 EXTENT OF THE VIOLATIONS WERE AND WHAT THE APPROPRIATE
21 REMEDIES AND SANCTIONS WOULD BE BEYOND WHAT WE THINK IS
22 APPROPRIATE WHICH IS LIKE A MINIMUM TERMINATING SANCTIONS.

23 THE COURT: THE LARGEST QUESTION FOR THE COURT IS
24 WHY WAS IT NECESSARY TO HAVE ALL THIS CONFIDENTIAL INFORMATION
25 DEDESIGNATED AS BEING CONFIDENTIAL? WHY? IF THAT INFORMATION
26 IS USED FOR THE PROSECUTION OF A PLAINTIFF'S CASE TO SEEK

1 RECOMPENSE FOR WHATEVER DAMAGES THAT PLAINTIFF HAD SUSTAINED
2 AS A RESULT OF THE ALLEGED CONDUCT OF FACEBOOK, IT WOULD SEEM
3 TO ME THAT SO LONG AS THAT INFORMATION WAS AVAILABLE TO
4 PROSECUTE THE CASE, IT DIDN'T NEED TO BE WITHIN THE PUBLIC
5 DOMAIN. AND THEY COULD ACCOMPLISH WHAT THEY COULD ACCOMPLISH.

6 MOTIONS TO SEAL ARE FREQUENTLY GRANTED BY COURTS.
7 PROTECTIVE ORDERS ARE ROUTINELY ISSUED BY COURTS. I SIGN THEM
8 ALMOST DAILY IN COMPLEX LITIGATIONS AND OTHERWISE. THIS IS
9 NOTHING NEW. AND THE CASES ARE PROSECUTED WITHIN THE AMBIT OF
10 THOSE PROTECTIVE ORDERS.

11 SO THE COURT IS CONCERNED AS TO HOW AND WHY THESE
12 DOCUMENTS WERE DISCLOSED. AND WHY THERE WAS SO MUCH EFFORT TO
13 HAVE THEM DISCLOSED BEYOND THE LAWSUIT IN THE FIRST PLACE.
14 THAT DOESN'T MAKE ANY SENSE TO THE COURT, IF ALL LAWSUITS
15 SUBJECT TO PROTECTIVE ORDERS ARE PROSECUTED WITHIN THOSE
16 PROTECTIVE ORDERS.

17 MS. MEHTA: YOUR HONOR, THAT'S EXACTLY OUR QUESTION.
18 AND THAT'S WHY WE REQUESTED THIS EXPEDITED DISCOVERY AND
19 PRESERVATION OF EVIDENCE. ESPECIALLY GIVEN THAT SINCE
20 THESE -- AT LEAST THE MOST RECENT OR THE FINAL STEP IN THIS
21 VIOLATION OF THE COURT'S ORDER HAS COME TO LIGHT, WE NEED TO
22 KNOW EXACTLY WHAT'S HAPPENED BECAUSE SINCE THAT POINT WE KNOW
23 EVIDENCE HAS BEEN DESTROYED OR DELETED. AND WE HAVE SWORN
24 STATEMENTS THAT THAT WAS DONE AT THE DIRECTION OF COUNSEL.

25 SO THE QUESTION IS HOW DO WE AND MOST IMPORTANTLY
26 THE COURT GET TO THE BOTTOM OF WHAT HAPPENED HERE AND WHEN IT

1 STARTED? AND WHO WAS INVOLVED? AND WHETHER, IN FACT, AS AT
2 LEAST WHAT WE KNOW NOW SUGGEST THIS WAS ALL A LONGSTANDING
3 PLAN ON BEHALF OF AT LEAST SOME MEMBERS OF THE SIX4THREE SIDE
4 TO BE ABLE TO LEAK INFORMATION TO THE PRESS FOR THEIR ULTERIOR
5 MOTIVES OR EXTRAJUDICIAL MOTIVES.

6 AND ON THAT QUESTION, THE QUESTION OF HOW WE'RE
7 GOING TO GET TO THE BOTTOM OF THIS. WE HAD A HEARING AN
8 EMERGENCY HEARING WITH YOUR HONOR LAST FRIDAY AFTERNOON AT
9 WHICH POINT YOU ORDERED EXPEDITED DISCOVERY.

10 AND SINCE THAT TIME, THREE THINGS HAVE HAPPENED.
11 ONE IS THAT WE HAVE HAD A FURTHER LOSS OF EVIDENCE. THERE'S A
12 DROPBOX ACCOUNT NOW THAT HAS BEEN DELETED THAT WE CAN'T ACCESS
13 OR THE FORENSIC EXAMINER CAN'T ACCESS. AND MR. SCARAMELLINO
14 SAID HE DELETED IT ON COUNSEL'S ADVICE.

15 SECOND, WE HAVE A LACK OF COOPERATION IN GETTING THE
16 BASIC EVIDENCE PRESERVED THAT YOUR HONOR ORDERED PRESERVED
17 LAST FRIDAY THAT INCLUDES THE EMAIL. IT INCLUDES NEEDING
18 MR. SCARAMELLINO'S ASSISTANCE AND MULTIFACTOR AUTHENTICATION
19 TO GET TO THE GOOGLE DRIVE, WHICH THEY DON'T EVEN CHALLENGE
20 THAT AS BEING OUTSIDE THE SCOPE OF THE ORDER. THEY STILL
21 HAVEN'T PROVIDED ACCESS. IT'S A WEEK LATER AND WE STILL DON'T
22 KNOW IF THE GOOGLE DRIVE DOCUMENTS THAT WERE SUPPOSED TO BE
23 PRESERVED HAVE BEEN PRESERVED OR IF THEY HAVE BEEN LOST OR
24 DESTROYED IN THE INTERVENING WEEK.

25 THE COURT: I BELIEVE THAT THE SPIRIT OF MY
26 NOVEMBER 30TH ORDER INVOLVED THE EMAILS AND GMAIL ACCOUNTS.

1 THAT WAS MY INTENT, AND I AM PREPARED TO ISSUE A CLARIFICATION
2 ORDER IN THAT REGARD. PLEASE PROCEED.

3 MS. MEHTA: THANK YOU, YOUR HONOR. AND THEN THE
4 THIRD ISSUE. THE THIRD THING THAT'S HAPPENED IS THAT WE HAVE
5 MADE ESSENTIALLY NO PROGRESS WHATSOEVER ON DISCOVERY, SO WE
6 SAT HERE WITH YOUR HONOR LAST FRIDAY AFTERNOON. AND WHAT WE
7 HAVE IS INCOMPLETE PRESERVATION OF THE EVIDENCE THAT YOUR
8 HONOR ORDERED TO BE PRESERVED AND ZERO OTHER DISCOVERY.

9 WE HAVE NOT BEEN ABLE TO GET PHONE RECORDS WHICH
10 WERE ASKED FOR AS PART OF OUR DISCOVERY REQUEST. WE HAVE NOT
11 BEEN ABLE TO GET NON-PRIVILEGED DOCUMENTS. THEY ADMIT THAT
12 THEY ARE NON-PRIVILEGED DOCUMENTS THAT FALL WITHIN THE SCOPE
13 OF OUR DISCOVERY REQUEST. AND WHEN WE SAID, "WHEN CAN YOU GET
14 US THOSE NON-PRIVILEGED DOCUMENTS?" THEY COULDN'T PROVIDE ANY
15 TIMELINE ON WHICH THEY WERE GOING TO BE ABLE TO DO THAT.

16 WE CAN'T GET ANY SORT OF AGREEMENT ON HOW WE'RE
17 GOING TO GET ALL OF THE INFORMATION THAT WE REQUESTED PRODUCED
18 TO US OR WHEN WE'RE GOING TO GET THESE DEPOSITIONS SCHEDULED.
19 FIRST MR. KRAMER WAS AVAILABLE ON WEDNESDAY. THEN HE WAS
20 AVAILABLE ON MONDAY. THEN HE WASN'T AVAILABLE AT ALL. THEN
21 HE WAS AVAILABLE ON FRIDAY.

22 IT HAS BEEN LIKE CHASING OUR TAILS TRYING TO GET
23 BASIC DISCOVERY FROM THE OTHER SIDE ON THESE FUNDAMENTAL
24 ISSUES. EVEN THOUGH YOUR HONOR ALREADY FOUND VIOLATION OF THE
25 PROTECTIVE ORDER, ALREADY FOUND DESTRUCTION OF EVIDENCE AND
26 ORDERED THEM TO COMPLY WITH DISCOVERY. WE HAVE ACCOMPLISHED

1 NOTHING IN THE LAST WEEK. IT HAS BEEN DELAY DELAY DELAY.

2 THE COURT: ALL RIGHT. I'M SURE MR. RUSSO WILL SAY
3 THAT BECAUSE HE'S NEW COUNSEL BECAUSE THERE HAS BEEN
4 TRANSITION, THAT THAT MAY BE THE PRODUCT OF SOME OF THE DELAY.

5 MS. MEHTA: THAT DOESN'T JUSTIFY IT, YOUR HONOR. SO
6 LET'S TAKE A STEP BACK HERE. THEY'RE ENTITLED TO COUNSEL.
7 WE'RE NOT QUESTIONING THAT. BUT THESE ISSUES HAVE BEEN
8 PERCOLATING FOR WEEKS. AND, IN FACT, IT LOOKS LIKE THEY HAVE
9 BEEN PERCOLATING FOR MONTHS. FACEBOOK AND THE COURT WERE NOT
10 PRIVILEGED TO ALL THE PREVIOUS COMMUNICATIONS.

11 BUT CERTAINLY BEFORE THANKSGIVING THESE ISSUES HAVE
12 BEEN PERCOLATING. AND BASIC THINGS LIKE COMPLYING WITH THE
13 EVIDENCE PRESERVATION ORDER SHOULDN'T REQUIRE COUNSEL.
14 MR. SCARAMELLINO WAS A MEMBER OF THE LEGAL TEAM. YOU JUST
15 HEARD MR. RUSSO GET UP AND TALK ABOUT HOW HE'S PASSED THE BAR.
16 PRESERVING THE EVIDENCE DOES NOT REQUIRE PREPARATION OR
17 RETENTION OF NEW COUNSEL.

18 AND BEYOND THAT, YOUR HONOR, I THINK ONE OF THE
19 THINGS THAT'S MOST TROUBLING ABOUT THE DELAY WE'RE SEEING ON
20 THE OTHER SIDE IS FACEBOOK'S CONFIDENTIAL INFORMATION STILL
21 REMAINS AT RISK. ACCORDING TO MR. GROSS AS OF TUESDAY,
22 MR. SCARAMELLINO STILL HAD ACCESS TO FACEBOOK'S CONFIDENTIAL
23 INFORMATION AND HIGHLY CONFIDENTIAL INFORMATION.

24 MR. KRAMER MAY STILL HAVE ACCESS TO THE INFORMATION.
25 WE DON'T KNOW WHAT'S IN HIS GMAIL ACCOUNT. IT HASN'T BEEN
26 PRESERVED. NOTHING HAS BEEN PRODUCED TO US. WE HAVEN'T BEEN

1 TOLD ANYTHING ABOUT IT. WE HAVE NO IDEA WHAT WAS IN HIS GMAIL
2 ACCOUNT OR ANYWHERE ELSE AND WHETHER HE STILL HAS ACCESS TO
3 CONFIDENTIAL INFORMATION.

4 THE ONLY THING THAT WE KNOW FOR SURE IS THEY ADMIT
5 VIOLATING THE PROTECTIVE ORDER. THEY ADMIT TO HAVING DELETED
6 EVIDENCE. THEY CAN'T TELL US WHO HAS CONFIDENTIAL INFORMATION
7 OR TO WHAT EXTENT, AND THEY MAY STILL HAVE THAT CONFIDENTIAL
8 INFORMATION. OUR INFORMATION IS STILL AT RISK OF DISCLOSURE
9 AND DISSEMINATION IN THE VERY HANDS OF THE PEOPLE WHO SHOULD
10 NEVER HAD BEEN TRUSTED WITH IT TO BEGIN WITH.

11 SO THAT'S WHERE WE ARE NOW. AND SO WHAT, YOUR
12 HONOR, WHAT WE WOULD ASK FOR IS TWO IMMEDIATE THINGS. FIRST
13 IS -- ACTUALLY, I WOULD SAY FOUR IMMEDIATE THINGS FALL INTO
14 TWO CATEGORIES. THE FIRST IS WE NEED TO STOP THE RISK THAT
15 FACEBOOK'S CONFIDENTIAL AND HIGHLY CONFIDENTIAL INFORMATION
16 WILL CONTINUE TO BE LEAKED. AND THAT THIS COURT'S ORDERS WILL
17 CONTINUE TO BE VIOLATED.

18 I DON'T KNOW WHAT THEIR MOTIVES ARE, BUT WE CAN
19 IMAGINE WHAT THEIR MOTIVES WERE IN WANTING TO LEAK ALL OF THIS
20 INFORMATION TO THE PRESS.

21 THE COURT: I WOULD IMAGINE. WHAT IS YOUR
22 IMAGINATION INDICATING TO YOU?

23 MS. MEHTA: I THINK YOU AND I PROBABLY SHARE THE
24 SAME SPECULATION AS TO WHAT THEIR MOTIVES MIGHT BE. THOSE
25 MOTIVES HAVEN'T CHANGED. IF ANYTHING, THERE IS MORE MEDIA
26 ATTENTION ON THIS CASE NOW. ALLOWING THEM TO CONTINUE TO

1 POSSESS THAT INFORMATION IS INCREDIBLY RISKY AND IT ONLY
2 INVITES FURTHER RISK THAT OUR INFORMATION IS GOING TO GET
3 DISCLOSED, LEAKED AND, OF COURSE, ORDERS ARE GOING TO GET
4 VIOLATED.

5 SO WE WOULD REQUEST THAT THAT STOP IMMEDIATELY.
6 LET'S GET THE EVIDENCE PRESERVED AND THEN LET'S MAKE SURE THAT
7 ALL OF FACEBOOK'S CONFIDENTIAL INFORMATION IS RETURNED AND
8 DESTROYED IMMEDIATELY BY EVERYONE ON THEIR SIDE UNTIL WE CAN
9 SORT THIS OUT.

10 THE SECOND REQUEST WE HAVE IS TO TALK ABOUT EVIDENCE
11 PRESERVATION. AND THERE ARE A NUMBER OF SPECIFIC THINGS THAT
12 NEED TO BE DONE WE THINK ON THE EVIDENCE PRESERVATION FRONT.
13 THE FIRST ONE IS, AS YOUR HONOR HAS ALREADY SAID YOU WOULD DO,
14 LET'S CLARIFY THE GMAIL AND EMAIL WERE IN FACT WITHIN THE
15 PRESERVATION ORDER.

16 THE SECOND ONE IS MR. SCARAMELLINO AND MR. KRAMER
17 SHOULD APPEAR AT STROZ FRIEDBERG'S OFFICES TODAY TO
18 PARTICIPATE IN ALL OF THE MULTIFACTOR AUTHENTICATION AND OTHER
19 TASKS NECESSARY FOR THE FORENSIC EXAMINER TO HAVE ACCESS TO
20 GMAIL, EMAIL ACCOUNTS, GOOGLE DRIVES AND OTHER CLOUD STORAGE.

21 WE STILL DON'T HAVE GOOGLE DRIVE INFORMATION FOR
22 MR. SCARAMELLINO. WE DON'T HAVE GMAIL FOR EITHER OF THEM.
23 LET'S GET THEM TO THE OFFICES IN SAN FRANCISCO THIS AFTERNOON,
24 HAVE THEM SIT WITH THE FORENSIC EXAMINER. THEIR COUNSEL COULD
25 BE PRESENT. AND GET ALL OF THE PASSWORDS AND ALL OF THE
26 MULTIFACTOR AUTHENTICATION SO THAT THAT EVIDENCE CAN BE

1 PRESERVED.

2 THE COURT: ALL RIGHT. BEFORE WE GO TO STEPS THREE
3 AND FOUR OR CONCERNS THREE AND FOUR --

4 MS. MEHTA: YES.

5 THE COURT: -- I WAS LEADING UP TO SOMETHING WITH
6 MR. RUSSO.

7 MS. MEHTA: YES.

8 THE COURT: HIS CONCERN WAS THE INDEPENDENCE OF THE
9 FORENSIC EXAMINER. AND I THINK IT WOULD BE HELPFUL TO BOTH
10 PARTIES IF BOTH PARTIES COULD SHARE THIS EXAMINER. IN OTHER
11 WORDS, THE PARTIES COULD STIPULATE TO THE USE OF THE STROZ
12 FRIEDBERG FORENSIC EXAMINING COMPANY. AND THAT WAY EACH PARTY
13 COULD HAVE ACCESS TO THE INFORMATION. AND ALSO THE CONCERNS
14 OF PRIVACY COULD BE OBSERVED.

15 THERE ARE SEARCH TERMS THAT YOU HAD OUTLINED THAT WE
16 WERE GOING TO GO OVER TODAY WITH REGARD TO THE INFORMATION
17 THAT IS BEING SOUGHT. AND THE UTILIZATION OF THOSE SEARCH
18 TERMS WILL BE INSTRUMENTAL IN GLEANING OUT A LOT OF THE OTHER
19 CONFIDENTIAL INFORMATION THAT THEY'RE CONCERNED ABOUT THAT IS
20 UNRELATED TO THIS CASE.

21 AND IT WILL FACILITATE A LASER FOCUS ON WHAT IS
22 RELEVANT WITH REGARD TO THE DISCLOSURE OF THIS EVIDENCE THAT'S
23 IN VIOLATION OF OUR COURT ORDERS.

24 MS. MEHTA: YES, YOUR HONOR. AND WITH REGARD TO THE
25 FORENSIC EXAMINER, MY COLLEAGUE MR. LERNER IS OUR EXPERT IN
26 DEALING WITH THAT. I WOULD ASK WITH THE COURT'S PERMISSION TO

1 HAVE HIM ADDRESS THE QUESTION OF HOW WE DEAL WITH THE FORENSIC
2 EXAMINER.

3 THE COURT: WHAT I'M SUGGESTING IS THAT THE PARTIES
4 SHARE. THIS IS AN ADMINISTRATIVE QUESTION. IT'S NOT A MATTER
5 OF TECHNOLOGY. IT IS HOW THIS FORENSIC EXAMINER IS USED.

6 MR. LERNER, THE COURT IS CONSIDERING EITHER THE
7 PARTIES STIPULATE TO THE USE OF STROZ FRIEDBERG. AND THAT
8 FACEBOOK RETAIN INDEPENDENT FORENSIC EXAMINER. ANOTHER ONE,
9 IF NECESSARY. AND THE REASON FOR THAT IS STROZ FRIEDBERG SO
10 FAR HAS DONE NOTHING MORE THAN TO COLLECT INFORMATION AND TO
11 PRESERVE IT. IT HAS NOT ACTED AS ADVOCATE FOR EITHER PARTY.
12 IT HAS NOT COMMUNICATED ANY OF THE INFORMATION GATHERED THUS
13 FAR TO EITHER THE FACEBOOK DEFENDANTS OR FACEBOOK AS AN ENTITY
14 NOR HAS IT COMMUNICATED ANYTHING TO THE PLAINTIFFS OR THE
15 INDIVIDUALS THAT ARE EMPLOYED WITH OR ASSOCIATED WITH THE
16 PLAINTIFFS NOR WITH MR. GODKIN OR MR. GROSS. SO NO ONE HAS
17 ACCESS TO THAT INFORMATION BEING COLLECTED.

18 AS SUCH, STROZ FRIEDBERG IS PRISTINE. AND BECAUSE
19 OF THAT, I BELIEVE IT IS A PERFECT TIME FOR THE PARTIES TO
20 CONSIDER SHARING THIS EXPERT BECAUSE THIS EXPERT IS CHARGED
21 WITH THE RESPONSIBILITY OF DISCOVERING THE TRUTH.

22 MR. LERNER: THANK YOU, YOUR HONOR.

23 THE COURT: YOU CAN ADVOCATE BASED ON THE
24 INFORMATION THAT IS GATHERED BY THAT INDEPENDENT EXPERT.
25 OTHERWISE, THIS EXPERT COULD BE DESIGNATED AS AN EVIDENCE CODE
26 SECTION 730 EXPERT BY THE COURT. THAT COULD HAPPEN TOO. BUT

1 I'M ASKING WHETHER, MR. LERNER, YOU HAD ANY COMMENTS IN THAT
2 REGARD.

3 MR. LERNER: THANK YOU, YOUR HONOR. SO AS WE
4 EXPLAINED AT THE LAST HEARING, STROZ FRIEDBERG AS YOU HAD
5 DESCRIBED IS AN INDEPENDENT FORENSIC FIRM. THEY ARE NOT PART
6 OF FACEBOOK. WE HIRED THEM AS AN INDEPENDENT ENTITY. AND TO
7 YOUR POINT, THEY HAVE AND WE HAVE COMPLIED WITH THE ORDER IN
8 THAT WE WILL NOT SEE THIS INFORMATION THAT IS COLLECTED AND
9 IMAGED UNTIL FURTHER ORDER OF THE COURT.

10 THEY ARE, HOWEVER, AN ENTITY THAT WE HIRED. A
11 CONTRACTOR THAT WE HIRED. AND THAT IS VERY IMPORTANT AND FOR
12 AN IMPORTANT REASON WHICH IS THAT WE FACEBOOK NEEDED TO BE
13 ABLE TO BE SURE THAT, A, A COMPETENT ENTITY WAS PRESERVING
14 THIS INFORMATION. AND, B, THAT WE COULD CONSULT WITH OUR OWN
15 FIRM TO GET ADVICE ON WHAT STEPS WE SHOULD TAKE. AND WE WERE
16 OPEN ABOUT THAT PROCESS AND CLEAR ABOUT IT. AND INDEED THAT'S
17 THE PROCESS THAT IS REGULARLY FOLLOWED IN CASES LIKE THIS ONE.
18 AND TO YOUR HONOR'S POINT, THERE IS NO DISPUTE, AGAIN, THAT WE
19 COMPLIED TO HAVE THIS INFORMATION. INDEED WE DON'T WANT THIS
20 INFORMATION.

21 IF THERE'S A QUESTION ABOUT WHAT TO DO WITH THE
22 CONFIDENTIAL INFORMATION AFTER IT IS PRESERVED, I COMPLETELY
23 UNDERSTAND YOUR POINT. BUT INSTEAD OF VAGUE AND OVERBROAD
24 STATEMENTS ABOUT, WELL, THERE'S, YOU KNOW, PRIVACY OR
25 PRIVILEGE CONCERNS HERE. I WANT TO BE MORE SPECIFIC ABOUT HOW
26 THIS IS DONE.

1 ONCE THE PRESERVATION IS DONE, THEN THE PARTIES, IF
2 NECESSARY, COULD AGREE THAT THE OUTPUT FROM THAT PRESERVATION,
3 I.E., THE OUTPUT FROM RUNNING THE SEARCH TERMS, THAT COULD BE
4 DONE BY SOMEONE INDEPENDENT, IF NECESSARY.

5 BUT WHAT WE CAN'T DO AS FACEBOOK HAVING ESTABLISHED
6 THE RELATIONSHIP WITH STROZ FRIEDBERG, WE GET ADVICE FROM
7 THEM. WE WORK WITH THEM. WE CAN'T NOW SWITCH GEARS AND UNDO
8 THAT. BUT AS I INDICATED LAST TIME, I THINK THE PROCESS WOULD
9 BE THE OUTPUT FROM THE TERMS CAN GO TO SOMEONE OR AN ENTITY
10 THAT IS INDEPENDENT.

11 THAT CAN BE -- I THINK IT MAKES THE MOST SENSE A
12 COMBINATION OF EITHER. ANOTHER ENTITY WHICH TO YOUR POINT IS
13 NEUTRAL. IT COULD BE ANOTHER FORENSIC FIRM OR IT MAY MAKE
14 SENSE FOR THE OUTPUT, I.E., THE DOCUMENTS THAT HIT ON THOSE
15 SEARCH TERMS TO JUST GO TO A REFEREE WHICH IS COMMON IN THESE
16 SITUATIONS.

17 THE REFEREE CAN LOOK THROUGH THE DOCUMENTS WHICH
18 WILL HIT ON THOSE SEARCH TERMS AND CALL BALLS AND STRIKES ON
19 WHAT IS A DOCTOR'S APPOINTMENT THAT HAS NOTHING TO DO WITH
20 THIS OR WHAT IS A COMMUNICATION WITH ONES WIFE THAT HAS
21 NOTHING TO DO WITH THIS. TO YOUR HONOR'S POINT, WHEN WE
22 STARTED OFF THE SEARCH TERMS ARE INTENDED TO AVOID EXACTLY
23 THAT. AND ONE THING THAT NO ONE ON THE PLAINTIFFS' SIDE OF
24 THE TABLE HAS OR I THINK CAN ARGUE IS THAT THOSE SEARCH TERMS
25 ARE LIKELY TO GENERATE ANY OF THE CONCERNS THEY ARE TALKING
26 ABOUT.

1 IF YOU LOOK THROUGH EXHIBIT H WHICH HAS THE SEARCH
2 TERMS, THOSE ARE OBVIOUSLY TAILORED TO DEAL WITH EXACTLY THESE
3 CONCERNS. WE DIDN'T JUST DASH THOSE OFF. WE OBVIOUSLY
4 PREDICTED AHEAD OF TIME THAT THERE WOULD BE ATTEMPTS TO SLOW
5 THIS DOWN.

6 AND SO WE LOOKED THROUGH AND DID THOSE SEARCH TERMS
7 BASED ON EXACTLY THIS CONCERN. AND THE SEARCH TERMS TIE OFF
8 TO EXACTLY WHAT IS IN THE DECLARATIONS THAT HAVE BEEN
9 SUBMITTED TO THE COURT. WITH YOUR HONOR'S PERMISSION JUST
10 BECAUSE I THINK IT'S EFFICIENT, I THINK AT THIS POINT IT MAKES
11 SENSE TO QUICKLY COVER THE ARGUMENTS THAT YOU HEARD ABOUT
12 PRIVILEGE AND PRIVACY BECAUSE I THINK THEY AFFECT THIS
13 DISCUSSION. BUT I'M HAPPY TO ALSO PAUSE.

14 THE COURT: ALL RIGHT. I DID HAVE OTHER QUESTIONS
15 TO ASK. I WILL JUST DEFER THOSE UNTIL I HEAR YOUR ARGUMENT.

16 MR. LERNER: OKAY. WE'VE ALREADY TALKED ABOUT
17 OBVIOUSLY THE HISTORY HERE. THE COURT'S ORDERS SO FAR AND THE
18 NEED FOR SPEED. WHAT YOU HAVE WHEN YOU LOOK AT WHAT HAS BEEN
19 SUBMITTED TO THE COURT SO FAR IN TERMS OF THE DECLARATIONS
20 SHOWS THAT THERE IS NOT IN FACT A REAL PRIVILEGE CONCERN HERE
21 OR A REAL PRIVACY CONCERN HERE. AND THAT IS NOT JUST BECAUSE
22 OF THE NARROWLY CRAFTED SEARCH TERMS.

23 THE PROBLEM, YOUR HONOR, IS, AS YOU ASKED THEM UNDER
24 OATH TO MR. KRAMER IN FACT, IS YOUR DECLARATION TRUE? AND
25 FROM THE ATTORNEYS YOU HEARD A LOT OF STATEMENTS ABOUT WHAT
26 HAPPENED HERE. THE DECLARATIONS SUBMITTED TO YOUR HONOR PUT

1 AT ISSUE PLAINTIFFS' STORY ABOUT WHAT HAPPENED HERE.

2 THEY PUT FORWARD THE FACTS THAT THEY BELIEVE ARE
3 MOST FAVORABLE TO THEIR STORY. THEY PUT FORWARD A STORY ABOUT
4 WHEN THEY CONTACTED THE MEDIA. THEY PUT FORWARD A STORY ABOUT
5 WHEN THEY CONTACTED DCMS. THEY EXPRESSLY WAIVED ON THEIR
6 COMMUNICATIONS WITH COUNSEL.

7 MR. KRAMER AND MR. GODKIN TOLD US ALL ABOUT THEIR
8 COMMUNICATIONS AND HOW CAREFUL THEY ALLEGEDLY WERE ON
9 NOVEMBER 19TH, ON NOVEMBER 20TH, ON NOVEMBER 21ST. BOTH OF
10 THEIR DECLARATIONS GO THROUGH IN GREAT DETAIL EVERYTHING THAT
11 HAPPENED ON THOSE DAYS. AND YET NOW APPARENTLY THEY DON'T
12 WANT TO HAVE SEARCH TERMS OR CUSTODIANS OR QUESTIONS ABOUT
13 WHAT HAPPENED ON NOVEMBER 22ND OR NOVEMBER 23RD.

14 UNDER THE CASE LAW, WHICH WE CITED FOR YOU, THIS IS
15 THE CLEANEST CASE OF WAIVER THAT YOU COULD HAVE. THE CASE
16 JONES V. SUPERIOR COURT, 119 CAL. APP. 3RD, 534, THAT IS THE
17 SEMINAL CASE ON THIS POINT. IT ACTUALLY STARTED OFF WITH
18 PATIENT POSITION PRIVILEGE. AND THEN WAS ADOPTED BY THE
19 COURTS IN ADDRESSING ATTORNEY/CLIENT PRIVILEGE INCLUDING AS
20 DESCRIBED IN THE GARCIA CASE THAT WE CITE.

21 EXPLAINS THAT A CLIENT, FOR EXAMPLE, WHO HAS
22 DISCLOSED HER CONVERSATION WITH A LAWYER ON MONDAY OUGHT NOT
23 BE PERMITTED TO CLAIM PRIVILEGE WITH RESPECT TO A CONVERSATION
24 WITH THE SAME LAWYER AND RELATE IT TO THE SAME SUBJECT MATTER
25 ON TUESDAY. THAT IS THE TAKEAWAY FROM THE JONES CASE. AND
26 THE OVERLAP HERE COULD NOT BE MORE CLEAR. YOU DON'T GET TO

1 SAY WE DID EVERYTHING ON THE UP AND UP ON NOVEMBER 19TH,
2 NOVEMBER 20TH, NOVEMBER 21ST. HERE ARE COMMUNICATIONS.
3 MR. GODKIN DOESN'T GET TO SAY HERE IS WHAT I SENT TO
4 MR. KRAMER. AND MR. KRAMER DOESN'T GET TO SAY I FOLLOWED HIS
5 ADVICE ON ALL THOSE DAYS. AND THEN POOF. WE'RE NOT TELLING
6 YOU ANYTHING OR PRODUCING DOCUMENTS OR SHOWING UP TO TALK
7 ABOUT WHAT HAPPENED WHEN WE ACTUALLY VIOLATED THREE ORDERS OF
8 THIS COURT.

9 IT IS ALSO IMPORTANT EVEN IF I WERE WRONG ON WHAT
10 EVERYTHING I JUST SAID, WHICH I'M NOT, THAT THE STATEMENTS
11 FROM MR. KRAMER WHICH YOU ASKED HIM ABOUT ARE NOT ACCURATE.
12 AND THE CRIME FRAUD EXCEPTION APPLIES TO MATERIAL
13 MISREPRESENTATIONS TO A COURT.

14 FOR EXAMPLE, MR. KRAMER SAYS ON MANY OF THOSE DAYS
15 THAT HE REFUSED TO PRODUCE DOCUMENTS. THAT'S WHAT HIS
16 DECLARATION SAYS. I REFUSED TO PRODUCE DOCUMENTS IN RESPONSE
17 TO THE DCMS'S REQUEST. THAT IS NOT TRUE. THE DOCUMENTS THAT
18 HE ATTACHED TO HIS DECLARATION SHOW THAT RATHER THAN REFUSING
19 TO PRODUCE DOCUMENTS, HE PROVIDED VERY CAREFUL INSTRUCTIONS AS
20 TO HOW AND WHEN THE COMMITTEE SHOULD GO OUT DEMANDING THE
21 DOCUMENTS.

22 HE SAID, "I CAN'T DO THIS VOLUNTARILY." HE DIDN'T
23 SAY, "I CAN'T DO IT FULL STOP. GO AWAY. THE COURT HAS SAID I
24 CAN'T." HE SAID, "I CAN'T DO IT VOLUNTARILY." AND THEN LOW
25 AND BEHOLD, YOU GET THE DEMAND WHICH IS NO LONGER A VOLUNTARY
26 REQUEST THAT MR. RUSSO JUST DESCRIBED.

1 MR. KRAMER SAYS, "I HAVE NOT REVIEWED THESE
2 DOCUMENTS." IN HIS DECLARATION HE SAYS, "IN NO UNCERTAIN
3 TERMS I DID NOT REVIEW HIGHLY CONFIDENTIAL DOCUMENTS."

4 EXHIBIT NO. 3 TO HIS DECLARATION SHOWS THAT, IN
5 FACT, WHAT HE TOLD THE COMMITTEE WAS THAT HE HAD UNREDACTED
6 COPIES IN HIS POSSESSION. I DON'T KNOW. IT'S CERTAINLY HARD
7 FOR ME TO KNOW THAT I HAVE AN UNREDACTED COPY OF SOMETHING
8 WITHOUT LOOKING AT IT. IT'S EVEN HARDER FOR ME TO SAY, AS
9 MR. KRAMER DID IN THE SAME EMAIL, THAT THE INFORMATION IN
10 THESE DOCUMENTS IS RELEVANT TO YOUR INVESTIGATION.

11 HOW DOES ONE SAY INFORMATION IN DOCUMENTS THAT THEY
12 HAVEN'T REVIEWED IS RELEVANT? HE HAD OBVIOUSLY REVIEWED THE
13 DOCUMENTS IN ORDER TO SAY THEY WERE UNREDACTED AND IN ORDER TO
14 SAY THEY WERE RELEVANT. FURTHERMORE, HIS DECLARATION IS
15 DEVOID OF ANY DISCUSSION OF THE FACT THAT HE HAD HAD ACCESS
16 THROUGH THE LEGAL TEAM FOR A VERY LONG UNKNOWN PERIOD OF TIME.

17 THERE'S NO DISCLOSURE WHATSOEVER ABOUT THAT. IT IS
18 NOT FORTHCOMING. AND UNDER THE STATE FARM DECISION, THESE ARE
19 JUST A FEW OF THE MATERIAL MISREPRESENTATIONS. IT IS CRITICAL
20 TO NOTE IN THIS INQUIRY THAT THIS IS NOT THE FIRST TIME FOR
21 MR. KRAMER NOR IS IT THE FIRST TIME FOR COUNSEL.

22 BEFORE THIS CASE GOT TO YOUR HONOR, SIX4THREE CAME
23 TO THE COURT AND SAID, "THIS IS A VERY IMPORTANT CASE. WE'VE
24 GOT 5,000 USERS THAT ALREADY PURCHASED THE APP." WHEN WE
25 POINTED OUT THAT WAS NOT TRUE, THEY CONTINUED TO ASSERT IT IN
26 THEIR AMENDED COMPLAINTS.

1 SO WE WENT TO JUDGE DUBOIS. AND WE SAID, "THEY ARE
2 MAKING UP FACTS THAT ARE NOT TRUE. IF THAT IS TRUE, THEY NEED
3 TO PRODUCE A SALES STATEMENT." JUDGE DUBOIS ORDERED THEM TO
4 PRODUCE THE SALES STATEMENT.

5 MR. KRAMER IN RESPONSE TO THAT VERIFIED A DISCOVERY
6 RESPONSE STATING THAT THE DATA AROUND SALES IS MAINTAINED BY
7 ANOTHER ENTITY APPLE, INC. AND PLAINTIFF HAS NO ACCESS TO THE
8 SALES DATA PRIOR TO APRIL 15TH. APPLE APPEARS TO DELETE OLDER
9 DATA. SO AS JUDGE DUBOIS WROTE IN RESPONSE TO THE COURT'S
10 ORDER TO PRODUCE DOCUMENTS, PLAINTIFF TOLD DEFENDANT THE
11 PRE LAWSUIT SALES DATA WAS NO LONGER ACCESSIBLE.

12 AND YET AFTER WE FILED OUR MOTION, THEY MIRACULOUSLY
13 PRODUCED THE SALES DATA. BUT ONLY FOR A FEW MONTHS. SO
14 PLAINTIFF REPRESENTED AT THAT POINT THAT ALL THE SALES DATA
15 HADN'T BEEN PRESERVED. EXACTLY THE OPPOSITE OF THE RESPONSE
16 THAT MR. KRAMER VERIFIED.

17 THEY FINALLY SAID, AS SOMEWHAT SIMILAR TO WHAT
18 YOU'RE NOW HEARING, DON'T WORRY. WE WILL CLEAR THIS UP.
19 EVENTUALLY WE WILL GET THERE. AS JUDGE DUBOIS INDICATED, THAT
20 WAS TOO LITTLE TOO LATE. JUDGE DUBOIS ISSUED EVIDENTIARY
21 SANCTIONS. FROM THE INFORMATION PROVIDED TO DEFENDANT BY THE
22 PLAINTIFF, ONLY THE SALE OF 276 APPS FOR \$412 WAS VERIFIED.

23 THE COURT FINDS THAT DEFENDANT SIX4THREE HAS NOT
24 ACTED IN GOOD FAITH IN REGARD TO DISCOVERY SURROUNDING THE
25 ACTUAL SALES OF THE BIKINI APP AND PROVIDED CONTRADICTORY AND
26 EVASIVE RESPONSES TO THE DISCOVERY REQUEST. SO THE SANCTION

1 WAS THAT THEY WERE PROHIBITED FROM INTRODUCING ANY EVIDENCE OR
2 ANY DOCUMENTS, RECORDS OR ARGUMENTS THAT THEIR ACTUAL SALES
3 EVER EXCEEDED \$412.

4 SO IN KEEPING WITH THE CALIFORNIA CASES, WE ARE
5 READY, ARE AT THE STEP THAT COURTS TAKE SHY OF TERMINATING THE
6 CASE BASED ON MISSTATEMENTS AND EVASIVE RESPONSES BY
7 MR. KRAMER SUBMITTED BY COUNSEL AND ARGUED AND ALREADY DEALT
8 WITH BY ANOTHER COURT. THIS IS NOT THEIR FIRST TIME. THIS IS
9 NOT A PRO SE INDIVIDUAL THAT'S NOT REPRESENTED BY COUNSEL AND
10 NOT GETTING ADVICE.

11 THEY HAVE EXPERIENCE WITH THIS. THEY KNOW
12 DECLARATIONS NEED TO BE ACCURATE. THEY KNOW THEIR SUBMISSIONS
13 TO THE COURT NEED TO BE ACCURATE, AND THEY ARE STILL NOT. SO
14 THERE IS NO CHANCE WE SUBMIT OF A VALID CLAIM WHEN YOU
15 ACTUALLY LOOK AT THE DETAILS OF PRIVILEGE WITH RESPECT TO THE
16 SUBJECTS WE ARE ASKING ABOUT AND THAT WOULD BE COVERED BY OUR
17 SEARCH TERMS.

18 ON PRIVACY, THEY HAVE ARGUED IN THE PAST THAT THE
19 PROTECTIVE ORDER IS IN PLACE TO ADDRESS FACEBOOK'S PRIVACY
20 CONCERNS. THAT'S A QUOTE. ONE WONDERS WHY ALL OF A SUDDEN
21 THE PROTECTIVE ORDER ENTERED IN THIS CASE ISN'T GOOD ENOUGH
22 FOR THEM. AND IT'S PARTICULARLY TROUBLING BECAUSE SO FAR
23 WE'VE FOLLOWED IT. THEY HAVEN'T.

24 LET'S TURN TO MR. SCARAMELLINO. AGAIN, YOU HEARD
25 VAGUE BUT NOT SPECIFIC CONCERNS ABOUT PRIVILEGE. NEITHER WE
26 NOR THE COURT LEARNED ABOUT MR. SCARAMELLINO UNTIL THEIR LAST

1 SECOND LETTER ON NOVEMBER 29TH WITH RESPECT TO THE PROTECTIVE
2 ORDER VIOLATIONS HERE. THE LETTER THAT WAS SUBMITTED TO YOUR
3 HONOR SAYS THAT THEY JUST LEARNED FOR THE FIRST TIME ON
4 NOVEMBER 20TH THAT SCARAMELLINO WAS THE SOURCE OF THE LEAK TO
5 THE NON-LAWYERS.

6 AGAIN, WITH RESPECT TO THE DECLARATIONS SUBMITTED TO
7 THIS COURT THAT IS DIRECTLY CONTRARY TO THE DECLARATION THAT
8 MR. GODKIN SUBMITTED IN ORDER TO ESTABLISH PRIVILEGE OVER
9 COMMUNICATIONS WITH MR. SCARAMELLINO. MR. GODKIN'S PRIOR
10 DECLARATION SAYS, "I DIRECTLY SUPERVISE WHAT HE DOES. WHAT HE
11 DOES IS AT MY DIRECTION UNDER MY SUPERVISION." AND THAT WAS
12 DONE IN ORDER TO CREATE PRIVILEGE WITH A THIRD PARTY
13 NON-LAWYER.

14 IN RESPONSE TO THE POINT THAT WAS JUST RAISED THAT
15 HE IS A LAWYER, NO. HE WAS NOT A LAWYER. HE TESTIFIED UNDER
16 OATH. HE NEITHER SAT NOR PASSED THE BAR ANYWHERE. THE FACT
17 THAT HE JUST DID HERE DOES NOT RETROACTIVELY CREATE ANY
18 PRIVILEGE OR WORK PRODUCT. AND WHAT'S HAPPENING IS YOU HAVE
19 DIRECTLY CONFLICTING STATEMENTS ABOUT HIS ROLE THAT SUIT THEIR
20 NEEDS WHENEVER THEY WANT TO ESCAPE PRODUCING HIS DOCUMENTS.

21 SO, AGAIN, YOU'VE GOT A WAIVER ON THE SUBJECT AND
22 MATERIAL MISREPRESENTATIONS ABOUT KEY ISSUES. WITH RESPECT TO
23 THE LAWYERS MR. GODKIN AND MR. GROSS, WE MEET THE STANDARD.
24 THERE IS NO ARGUMENT. THERE'S BEEN NO ARGUMENT AT ALL
25 PRESENTED TO YOUR HONOR THAT THEIR TESTIMONY IS NOT ESSENTIAL
26 OR THAT THERE'S ANY OTHER WAY WE COULD GET AT THIS INFORMATION

1 IN AN EFFICIENT MANNER.

2 THE ONLY ARGUMENT THAT YOU'VE HEARD AGAIN IS THE
3 VAGUE ASSERTION OF PRIVILEGE. BUT IF YOU LOOK AT THE MERIT
4 PLAN CASE SET FORTH IN OUR PAPERS, THAT IS NOT HOW THIS WORKS.
5 YOU DO NOT GET TO GRIND THE PROCESS TO HALT MERELY BY SAYING
6 I'M A LAWYER AND, THEREFORE, EVERYTHING I DO OR SAY IS
7 PRIVILEGED. THAT CASE EXPRESSLY POINTS OUT. NO. YOU COULD
8 TAKE THE DEPOSITION. IF THERE IS A VALID CLAIM, YOU COULD
9 MAKE IT. WE'VE ALREADY OFFERED TO WORK WITH SOMEBODY LIKE
10 FORMER JUDGE KRAMER TO CALL BALLS AND STRIKES AND SIT THERE
11 WHILE THIS HAPPENS.

12 BOTH OF THOSE GENTLEMEN, AGAIN, TALKED ABOUT THEIR
13 COMMUNICATIONS ON THE 19TH, THE 20TH, THE 21ST. WE NEED TO
14 KNOW ABOUT THE 22ND AND THE 23RD AND WHAT'S HAPPENED SINCE.
15 WE DIDN'T KNOW ABOUT, FOR EXAMPLE, THE 11/20 -- NOVEMBER 20TH
16 REVELATION THAT MR. SCARAMELLINO HAD ACCESS TO THESE DOCUMENTS
17 AND NEITHER DID THE COURT. NO ONE SAW FIT TO TELL YOU UNTIL
18 JUST BEFORE THE HEARING. WE NEED TO GET TO THE BOTTOM OF
19 THIS.

20 AND WITH RESPECT TO MR. GROSS, I CAN'T DO A BETTER
21 JOB THAN YOUR HONOR DID OF WALKING THROUGH THE INCONSISTENCIES
22 IN HIS DECLARATION. IN HIS DECLARATION ON THE NOVEMBER 29TH
23 LETTER WE WOULD BE HERE UNTIL LATE THIS AFTERNOON IF WE RAN
24 THROUGH AGAIN ALL OF THE INCONSISTENCIES THAT YOU COVERED.

25 SO THE PLAN THAT WE HAVE OUTLINED IS LET'S RUN THE
26 TERMS THAT WE DESCRIBED. THAT CAN BE DONE QUICKLY. TO YOUR

1 HONOR'S POINT IF THE OUTPUT NEEDS TO BE PROVIDED TO A THIRD
2 PARTY, SO BE IT. I THINK IN THIS INSTANCE THAT COULD PROBABLY
3 GO STRAIGHT AGAIN TO A REFEREE TO SOMEBODY TO CALL THE BALLS
4 AND STRIKES BASED ON WHAT WE DESCRIBED SO FAR HERE. AND THEN
5 WE CAN HAVE THE DEPOSITIONS QUICKLY THEREAFTER.

6 WITH RESPECT TO THE NEW ARGUMENT SUBMITTED LATE LAST
7 NIGHT IN THE BRIEFING, THEY ARE ACTUALLY ABSOLUTELY CONSISTENT
8 WITH EVERYTHING THAT HAS HAPPENED SO FAR. FOR EXAMPLE, THE
9 BRIEF SAYS THAT MR. SCARAMELLINO HAD NO COMMUNICATIONS WITH
10 THIRD PARTIES. THAT WE HAVE NO EVIDENCE OF THAT. THEY SAY
11 THAT'S JUST A MERE SUGGESTION ON OUR PART. WE'RE MAKING IT
12 UP. THAT'S COMPLETELY FALSE. IT'S FALSE BASED ON THEIR OWN
13 DOCUMENTS. THEIR OWN PRIVILEGE LAW SHOWS EMAIL AFTER EMAIL
14 FROM HIS GMAIL ACCOUNT TO THIRD PARTIES.

15 SO THE MISREPRESENTATIONS GO ON. ON THE LAW, FOR
16 SOME REASON THEY'RE SUBMITTING CASE LAW ON INJUNCTIONS TO YOUR
17 HONOR INSTEAD OF TALKING ABOUT PRESERVATION ORDERS. AND THEY
18 DON'T EVEN ADDRESS THE SEARCH TERMS, WHICH I NOW TALKED ABOUT.

19 SO WITH THAT BACKGROUND, WE SUBMIT THAT WE CAN AND
20 SHOULD DO THIS QUICKLY. AND THE TERMS ARE NARROWLY TAILORED
21 TO DO IT QUICKLY AND SOMEBODY LIKE I SAID A REFEREE. I
22 OBVIOUSLY WON'T PRESUME TO KNOW WHETHER OR NOT YOUR HONOR
23 WANTS TO SORT THROUGH THE DOCUMENTS. BUT SOMEBODY CAN LOOK
24 THROUGH THE DOCUMENTS THAT HIT ON THESE SEARCH TERMS AND DO IT
25 RELATIVELY QUICKLY TO PROVIDE THEM PRECISELY BECAUSE THE
26 SEARCH TERMS ARE TAILORED TO COMMUNICATIONS WITH THIRD PARTIES

1 AND COMMUNICATIONS ABOUT THE BREACHES OF THIS.

2 ONE LAST POINT THERE. WE PICKED A TIMEFRAME. WE
3 DIDN'T SAY "THE LAST 12 YEARS." WE DIDN'T SAY, YOU KNOW, "WE
4 WANT TO LOOK AT ALL OF YOUR EMAILS." WE SAID, "WE WANT TO
5 LOOK FROM JANUARY 1ST, 2017," WHICH IS IN OUR LETTER. WE
6 PICKED THAT DATE FOR A REASON. THAT'S WHEN THEY STARTED
7 GETTING THESE DOCUMENTS.

8 SO THAT'S THE DATE WE SUBMIT AS A DATE RANGE WHICH
9 IS JANUARY 1ST, 2017, TO PRESENT. THAT'S WHEN THEY STARTED
10 GETTING THIS STUFF. AS MS. MEHTA POINTED OUT, WE CAN ALREADY
11 SEE COMMUNICATIONS IN FEBRUARY. THAT'S A LOGICAL TIMEFRAME.
12 AND IT'S NOT GOING BACK 10 OR 12 OR WHATEVER YEARS WERE
13 DESCRIBED TO YOUR HONOR.

14 THE COURT: THANK YOU, MR. LERNER.

15 MR. LERNER: THANK YOU.

16 MR. RUSSO: MAY I JUST TAKE A MINUTE OF YOUR TIME --

17 THE COURT: YES.

18 MR. RUSSO: -- TO CLARIFY THESE THREE THINGS? I
19 THINK THERE'S A SUGGESTION THAT MR. KRAMER HAS SUPER POWERS
20 OVER PARLIAMENT. I THINK THAT'S CRAZY. THAT MR. KRAMER
21 SOMEHOW CAUSED THE SUBPOENA TO BE SERVED ON HIMSELF WHILE HE
22 WAS IN LONDON. AND THAT HE ACTUALLY INDUCED THAT. THAT HE
23 CAUSED THE COMMITTEE OF PARLIAMENT TO ASSEMBLE ITSELF TO ISSUE
24 A SUBPOENA AND THEN TO ISSUE A CONTEMPT CITATION. AND THEN TO
25 BE THREATENED WITH INCARCERATION THAT HE ACTUALLY INDUCED AND
26 WANTED THAT. I THINK THAT'S ABSURD ON ITS FACE. I DON'T

1 THINK ANYONE OF US HAS THAT KIND OF POWER.

2 THE SECOND POINT IS THIS NOTION THAT AT THE END OF
3 THE DAY THERE IS A LACK OF COOPERATION. MR. KRAMER TURNED
4 OVER HIS TRUE FACTOR AUTHENTICATION. THERE'S NO ISSUE ABOUT
5 THAT. MR. SCARAMELLINO HAS BEEN WILLING TO DO THAT SO LONG AS
6 HE GETS CLEARANCE THAT HE'S NOT VIOLATING ANY PRIVILEGE -- ANY
7 PRIVILEGES, ANY SECRET OBLIGATIONS, ANY OBLIGATIONS. HE'S
8 MORE THAN WILLING TO COOPERATE. WE EVEN SAID IT. HE IS
9 WILLING TO MAKE HIMSELF AVAILABLE TO TODAY.

10 HE FLEW IN FROM NEW YORK. HE IS HERE BASED ON
11 COMING FROM NEW YORK. HE LIVES AND WORKS IN NEW YORK. HE HAS
12 BEEN PART OF THE LEGAL TEAM FROM NEW YORK. THERE HAS BEEN NO
13 ISSUE ABOUT THAT. HE VOLUNTARILY CAME HERE BECAUSE YOUR HONOR
14 SAID YOU WANTED TO SEE HIM. HE SAID, "FINE. I'M HERE. AND I
15 WILL HAVE MY DEPOSITION DONE. AND I WILL HAVE IT DONE
16 LITERALLY AFTER THIS HEARING. I'M HAPPY TO SIT THROUGH MY
17 DEPOSITION AFTER THIS HEARING IN THIS COURTHOUSE WITH WHATEVER
18 COURT REPORTERS THEY WANT."

19 WE CONFIRMED THAT IN WRITING. THEY DIDN'T SAY,
20 "GREAT. THANK YOU FOR COOPERATING. WE REALIZE YOU'VE ONLY
21 BEEN IN THIS CASE 72 HOURS. THANK YOU VERY MUCH. YOU ARE
22 WILLING TO COOPERATE AND YOU'RE WILLING TO PRODUCE HIM SUBJECT
23 TO THE UNDERSTANDING THAT THIS SHOULDN'T BE A REPETITIVE
24 PROCESS." IF THEY WANT TO GO THROUGH ALL THE DOCUMENTS FIRST,
25 THEN THEY SHOULD DO THAT. THEY SHOULDN'T BE ABLE TO TAKE HIS
26 DEPOSITION NOW, BUT WE RESERVE OUR RIGHT TO TAKE IT AGAIN.

1 THAT'S NOT WHAT SHOULD HAPPEN. THAT'S NOT AN EFFICIENT
2 ADMINISTRATION OF JUSTICE BY ANY MEANS.

3 THE COURT: I AGREE.

4 MR. RUSSO: THEN THE THIRD POINT, YOUR HONOR, VERY
5 QUICKLY IS I DON'T THINK THEY CAN SAY TO YOU WITH A STRAIGHT
6 FACE, "WE HAVE NEVER USED THIS INDEPENDENT EXAMINER BEFORE."
7 WHEN YOU SAID "THIS EXAMINER IS PRISTINE," THE TYPICAL MEANING
8 OF THAT. I'VE ONLY BEEN DOING THIS GOING ON 38 YEARS. WE
9 HAVE NOT PREVIOUSLY EVEN USED THIS EXAMINER. THERE'S NO BIAS.

10 WE NEVER RETAINED THEM BEFORE. WE NEVER WORKED WITH
11 THEM BEFORE. AND THE PROBLEM EVEN AFTER JUST 72 HOURS OF
12 ACCESS IS MR. SCARAMELLINO TELLS ME AND PUT IN HIS DECLARATION
13 UNDER OATH THAT THE PEOPLE AT THAT FIRM AFFIRMED THAT THEIR
14 INTERPRETATION OF YOUR ORDER, WHICH I UNDERSTAND YOU CLARIFIED
15 WAS THAT THE DRIVES DID NOT IMPLICATE GOING AND GETTING THE
16 GMAIL. THEY ONLY WANTED TO TAKE AN IMAGE OF THE DRIVES.

17 AND MR. SCARAMELLINO ACTUALLY AFFIRMED THAT IN A
18 TEXT MESSAGE BACK TO THEM. THEY THEN APPARENTLY REPORTED TO
19 FACEBOOK THE POSITIONS HERE, WHICH THEY WERE AGREEING WITH
20 MR. SCARAMELLINO WAS THE RIGHT INTERPRETATION OF YOUR ORDER.
21 AND THEN THEY FLIPPED. AND THEY SAID, "OOPS. WE CHANGED OUR
22 MIND. WE ACTUALLY READ THE JUDGE'S ORDER AS APPLYING TO
23 GMAIL." NOT BECAUSE YOU HAD CLARIFIED IT BUT BECAUSE THEY HAD
24 CLARIFIED IT WITH FACEBOOK. THAT'S THE OPPOSITE OF AN
25 INDEPENDENT PERSON, YOUR HONOR.

26 THE COURT: ALL RIGHT. BUT WE'RE TALKING ABOUT TWO

1 DIFFERENT THINGS. I UNDERSTAND YOU'RE CONCERNED ABOUT THE
2 INDEPENDENCE, BUT I BELIEVE THAT IF THERE ARE SEARCH TERMS
3 THAT PEOPLE AGREE THAT WOULD BE APPROPRIATE TO UTILIZE WITH
4 ALL OF THE DATA THAT HAS BEEN GATHERED THUS FAR PURSUANT TO
5 THE DISCOVERY ORDERS THAT I ISSUED. SOMEONE ELSE CAN LOOK AT
6 THAT INFORMATION THAT HAS BEEN OBTAINED THROUGH THOSE SEARCH
7 TERMS.

8 SO FROM THAT POINT OF VIEW, STROZ FRIEDBERG IS ONLY
9 A MECHANISM TO OBTAIN DATA. AND THEY WILL NOT BE OPINING OR
10 OTHERWISE COMMENTING ON THAT DATA. THAT'S SOMETHING THAT THE
11 THIRD PARTY RETIRED JUDGE OR INDEPENDENT REFEREE COULD LOOK
12 AT.

13 MR. RUSSO: RIGHT. YOUR HONOR, THEY ARE TELLING YOU
14 STRAIGHT UP THEY WILL NOT AGREE TO THE TYPICAL RULES OF AN
15 INDEPENDENT EXAMINER WHICH IS EVERY COMMUNICATION THAT
16 FACEBOOK LODGES. JUST LIKE EVERY COMMUNICATION THAT ANYONE
17 FROM THE PLAINTIFF'S SIDE OR THE PLAINTIFF'S LEGAL TEAM LODGES
18 GETS DISCLOSED TO THE OTHER SIDE.

19 THAT'S WHAT IT MEANS TO BE INDEPENDENT. NO EX PARTE
20 COMMUNICATIONS. NO, HEY, YOU SHOULD REVERSE YOUR POSITION
21 WITHOUT ACTUALLY SAYING TO THE SIX4THREE TEAM "WE'RE TELLING
22 THEM TO REVERSE THEIR POSITION. DO YOU OBJECT TO THAT OR CAN
23 YOU CONSENT TO THAT?"

24 IT'S ALL OPEN AND TRANSPARENT. IT'S GOT TO BE
25 COMPLETELY OPEN AND TRANSPARENT. AND THAT'S KIND OF AT THE
26 HEART OF WHAT WE'RE SEEING HERE TODAY WHICH IS THERE IS A

1 CERTAIN DEGREE OF LACK OF TRANSPARENCY AND LACK OF OPENNESS.
2 THEY HAVE NOT SAID TO YOUR HONOR, AND I HAVE NOT SEEN IN ANY
3 OF THE PAPERWORK UP TO NOW. AND IT'S PRETTY STUNNING. THERE
4 IS A SECTION OF THIS PROTECTIVE ORDER THAT SAYS IF THERE IS
5 SOME SORT OF PROCESS SERVED ON YOU WHICH IS IN CONFLICT WITH
6 THIS COURT'S ORDERS, WE HAVE THE BURDEN. FACEBOOK HAS THE
7 BURDEN OR THE PARTY THAT'S AGGRIEVED HAS THE BURDEN TO GO TO
8 THAT OTHER JURISDICTION AND DO SOMETHING.

9 THEY WERE GIVEN NOTICE THAT THIS WAS HAPPENING
10 BEFORE THERE WAS EVER ANY DISCLOSURE AT ALL. FACEBOOK DID
11 ZERO. THEY DID NOTHING. THEY DIDN'T CALL THE BARRISTER.
12 THEY DIDN'T CALL THE SOLICITOR. THEY DIDN'T CALL THEIR OWN
13 REPRESENTATIVE IN THAT HOUSE OF LORDS TO SAY, "LOOK. DO
14 SOMETHING ABOUT THIS. BLOCK THIS COMMITTEE FROM DOING WHAT
15 IT'S DOING." THAT'S A BIG QUESTION FOR YOUR HONOR TO
16 ULTIMATELY DECIDE HERE.

17 THE COURT: HOW DID THE COMMITTEE GET THAT
18 INFORMATION?

19 MR. RUSSO: HOW DID THE COMMITTEE GET --

20 THE COURT: YES.

21 MR. RUSSO: -- GET THE FACT THAT MR. KRAMER WAS IN
22 ENGLAND?

23 THE COURT: YES. NO. NUMBER ONE, HOW DID THEY FIND
24 OUT HE WAS THERE?

25 MR. RUSSO: THE ANSWER --

26 THE COURT: HOW DID THEY KNOW WHERE HE WAS? HOW DID

1 HE KNOW WHEN HE WAS AVAILABLE? WHY WAS HE IN BUSINESS THERE
2 IN THE FIRST PLACE? WHY WAS IT NECESSARY FOR THE HOUSE OF
3 COMMONS TO KNOW THAT HE WAS WITHIN THE U.K. ON BUSINESS? WHY
4 WAS THERE COMMUNICATION BETWEEN HE AND THE U.K. WITH REGARD TO
5 THE AVAILABLE INFORMATION? WHY DID HE SAY THAT HE HAD
6 UNREDACTED VERSIONS OF INFORMATION THAT HE COULD NOT
7 VOLUNTARILY DISCLOSE?

8 THOSE ARE ALL THE QUESTIONS THAT THE COURT HAS AND
9 CERTAINLY THAT FACEBOOK HAS IN RELATION TO THESE PROCEEDINGS.
10 SO I UNDERSTAND YOUR ARGUMENT, COUNSEL. BUT THIS CUTS BOTH
11 WAYS. THERE'S A LACK OF TRANSPARENCY ON THE PART OF YOUR
12 CLIENTS IN RELATION TO THOSE QUESTIONS THAT I JUST ASKED.

13 MR. RUSSO: AND MR. KRAMER IS HAPPY TO TAKE THE
14 STAND RIGHT NOW AND ANSWER EACH AND EVERY ONE OF THOSE
15 QUESTIONS. AND FURTHER, YOUR HONOR, WHAT YOU WILL FIND OUT IS
16 THERE IS A NEWS REPORTER UNDOUBTEDLY THERE'S PROBABLY NEWS
17 REPORTERS HERE.

18 THERE IS A NEWS REPORTER THAT WORKS FOR THE GUARDIAN
19 THAT HAS BEEN TRACKING THIS CASE AND HAS BEEN TRACKING
20 FACEBOOK AND HAS BEEN TRACKING WHAT THE U.K. AS WELL AS THE
21 REST OF THE E.U. HAVE BEEN DOING TO FACEBOOK. AND THAT
22 REPORTER HAS APPARENTLY MADE SOME LINKAGE WITH MR. COLLINS WHO
23 IS ON THAT COMMITTEE. THAT REPORTER ULTIMATELY PROBABLY WILL
24 HAVE TO HAVE HER DEPOSITION TAKEN. THAT GIVES A LOT OF
25 EXPLANATION FOR WHAT OCCURRED THAT WAS NOT IN THE CONTROL OF
26 MR. KRAMER. THAT'S THE STORY YOU WILL ULTIMATELY HEAR WHEN

1 ALL THE FACTS ARE FINALLY PUT THROUGH THE WASH.

2 THE COURT: I THINK YOU'RE MISSING THE ULTIMATE FACT
3 WHICH IS WHY DID HE HAVE POSSESSION OF THAT INFORMATION IN THE
4 U.K. ON U.K. TERRITORY? LET ME REPHRASE.

5 WHY DID HE HAVE THAT CONFIDENTIAL INFORMATION WITHIN
6 THE JURISDICTION OF THE UNITED KINGDOM AND SUBJECT TO THE
7 REVIEW OF THE HOUSE OF COMMONS DCMS COMMITTEE?

8 MR. RUSSO: I THINK WHAT YOU WILL HEAR, YOUR HONOR,
9 AND MR. KRAMER WILL TESTIFY, IF YOU ALLOW HIM. HE WAS EVEN
10 SURPRISED THAT HE HAD ANY OF THAT ACCESS. THE WAY IN WHICH
11 THIS TOOL WORKS. THE WAY THE DROPBOX TOOL WORKS, YOU CAN GIVE
12 SOMEONE ACCESS TO A SET OF FOLDERS. I MEAN, YOUR HONOR, I
13 KNOW YOU'RE EXPRESSING DISBELIEF. I CAN READ YOUR BODY
14 LANGUAGE. I UNDERSTAND THAT.

15 AND I UNDERSTAND THE FACT THAT COMPUTERS CAN
16 SURPRISE ALL OF US AND MACHINES MAKE MISTAKES AND HUMANS MAKE
17 MISTAKES. WE HAVE A COMBINATION OF MACHINES AND HUMANS MAKING
18 MISTAKES. A MISTAKE WAS CLEARLY MADE. HE SHOULD NOT HAVE HAD
19 A FOLDER THAT HAD ANY HIGHLY CONFIDENTIAL INFORMATION.

20 THE COURT: WHY DID HE SAY THAT HE HAD CONFIDENTIAL
21 INFORMATION TO THE PRESS AND TO MR. COLLINS OF THE DCMS AS
22 ADMINISTRATOR OF PARLIAMENT?

23 MR. RUSSO: AND HE IS PREPARED TO TESTIFY ABOUT
24 THAT, YOUR HONOR. HE IS PREPARED TO RESPOND TO YOUR QUESTION.
25 HE WAS RESPONDING TO THE QUERIES FROM THE PRESS ABOUT WHAT
26 KNOWLEDGE DID HE HAVE ABOUT THE CASE.

1 NOW, YOU MAY SAY THAT HE WAS NOT CORRECTLY
2 ADMONISHED. OBVIOUSLY UNDER THE PROTECTIVE ORDER, THERE
3 SHOULD HAVE BEEN SOME EXPRESSED TRAINING ABOUT WHAT TO DO WHEN
4 PRESS INQUIRIES OCCUR. WE SO FAR NOT DISCLOSED ANY HIGHLY
5 CONFIDENTIAL INFORMATION. I HAVE NOT SEEN ANY HIGHLY
6 CONFIDENTIAL INFORMATION. I FRANKLY DON'T WANT TO SEE ANY
7 HIGHLY CONFIDENTIAL INFORMATION.

8 THE COURT: AND WHY DID HE SAY HE HAD IT TO THE
9 PRESS?

10 MR. RUSSO: YOU KNOW, SOMETIMES PEOPLE LIKE HIM
11 DECIDE TO TWEAK THE PRESS TO GET THEIR INTEREST, YOUR HONOR.

12 THE COURT: WHY DID HE DECIDE TO TWEAK THE PRESS TO
13 TWEAK THEIR INTEREST? YOU SEE. THERE'S A CONFIDENTIAL
14 PROVISION THAT HAS BEEN SET IN PLACE BY VIRTUE OF THE
15 NOVEMBER 2016 PROTECTIVE ORDER AS WELL AS MY MOTION TO SEAL.

16 NO SOONER THAN JUST A FEW DAYS. LESS THAN THREE
17 WEEKS AFTER MY ORDER WAS ISSUED TO SEAL THIS INFORMATION, IT
18 WAS DISCLOSED. AND THERE WAS VIGOROUS DISCUSSION BY BOTH
19 COUNSEL CONCERNING THE CONFIDENTIALITY OF THOSE DOCUMENTS.
20 AND WHAT WAS RELEVANT TO THIS LITIGATION AND WHAT WAS NOT AND
21 WHAT SHOULD BE SUITABLE TO BE SEALED AND UNSEALED.

22 MR. RUSSO: I HEAR YOU LOUD AND CLEAR, YOUR HONOR.
23 AND I DON'T HAVE ANSWERS TO WHAT THE TRAINING WAS OR WASN'T
24 WITH RESPECT TO HOW TO DEAL WITH THE PRESS AND HOW TO DEAL
25 WITH WHAT INFORMATION YOU HAVE AND HOW TO DEAL WITH WHAT WORK
26 PRODUCT YOU HAVE.

1 THE COURT: THERE WERE MOTIONS TO UNSEAL BY THE
2 PLAINTIFF. AND THERE WAS SOME VIGOROUS EFFORT TO TRY TO KEEP
3 THE INFORMATION WITHIN THE PUBLIC DOMAIN OR SOMEHOW OUTSIDE OF
4 THE SCOPE OF THE PROTECTIVE ORDER. AND WHAT IT APPEARS TO THE
5 COURT IS THAT WHAT COULD NOT HAVE BEEN DONE THROUGH THE FRONT
6 DOOR WAS DONE THROUGH THE BACK DOOR. THAT'S WHAT IT LOOKS
7 LIKE GIVEN WHAT I'VE SEEN FROM THE DECLARATIONS OF ALL PARTIES
8 CONCERNED. THE PAPERS FILED BY FACEBOOK AS WELL AS THE PAPERS
9 FILED BY THE PLAINTIFFS.

10 MR. RUSSO: I HEAR, YOUR HONOR. JUST SO YOU'RE
11 AWARE, I THINK THIS IS AN IMPORTANT CITATION FOR ME TO TAKE
12 DOWN BECAUSE THIS IS RELEVANT TO HOW YOU GO ABOUT MAKING A
13 DECISION. THIS ALMOST EXACT PROBLEM. AND, AGAIN, WE'VE ONLY
14 BEEN ON THIS CASE FOR UNDER 72 HOURS. THIS EXACT PROBLEM CAME
15 UP BEFORE JUDGE COUSINS IN A FEDERAL COURT CASE IN FEBRUARY OF
16 THIS YEAR. HARMON V. CITY OF SANTA CLARA, 323, FRV, 617,
17 DECIDED FEBRUARY 5TH, 2018. AND MAGISTRATE JUDGE COUSINS IN
18 THAT CASE NOTED THAT THERE WAS AN EXPRESSED AND EXPLICIT
19 VIOLATION OF A PROTECTIVE ORDER THAT REQUIRED SECRECY OF
20 CERTAIN INFORMATION THAT ULTIMATELY MADE ITS WAY THROUGH THE
21 INTERNET.

22 AND THE JUDGE WENT THROUGH A METHODOICAL PROCESS OF
23 FIGURING OUT EXACTLY WHAT FACEBOOK IS ASKING YOU TO FIGURE OUT
24 WHICH IS WHAT IS THE APPROPRIATE APPROACH FOR DEALING WITH A
25 SITUATION LIKE THIS BECAUSE THE INTERNET IS ALL AROUND US.
26 AND IT INVADES OUR LIVES IN DIFFERENT WAYS AND IT HELPS US IN

1 DIFFERENT WAYS. AND AT THE END OF THE DAY JUDGE COUSINS DID A
2 VERY DETAILED ANALYSIS OF HOW TO LOOK AT. HOW DO YOU LOOK AT
3 THE APPROPRIATENESS OF WHAT SHOULD THEN HAPPEN. I'M MORE THAN
4 HAPPY TO HELP FIGURE OUT WHAT SHOULD HAPPEN. I HAVE SOME
5 IDEAS FOR WHAT POSSIBLY COULD REMEDY THIS. I'M HAPPY TO SHARE
6 THEM WITH YOUR FOLKS AT FACEBOOK.

7 YOU KNOW, AS FAR AS THESE INDIVIDUALS ARE CONCERNED,
8 THEY ARE HAPPY TO TESTIFY TODAY. THEY ARE HAPPY TO TESTIFY
9 HERE IN COURT. THEY ARE HAPPY TO TESTIFY IN A DEPOSITION HERE
10 IN THE COURTHOUSE. THERE ARE SOME LOGISTICAL ISSUES BECAUSE
11 COUNSEL WHO REPRESENTS THE COMPANY WANTS TO GET ON A FLIGHT
12 FROM SFO LATER TONIGHT OR THIS AFTERNOON. THEY OBVIOUSLY WANT
13 TO BE A PART OF THESE DEPOSITIONS. THEY SHOULD BE. THERE ARE
14 DEPOSITIONS THE COMPANY SHOULD BE REPRESENTED. THEY ARE STILL
15 REPRESENTING THE COMPANY.

16 THE COURT: THE PROBLEM IS THERE ARE NO DOCUMENTS TO
17 QUESTION THE WITNESSES ON AT THIS TIME. THOSE DOCUMENTS HAVE
18 NOT BEEN DISCLOSED OR EVEN DISCOVERED BY VIRTUE OF THE SEARCH
19 TERMS THAT WOULD BE IMPLEMENTED. ALSO, UNLESS THE PARTIES
20 STIPULATE OTHERWISE TAKING THE DEPOSITION OF SOMEONE TWICE.
21 FIRST BEFORE THEY HAVE INFORMATION AND AFTERWARDS IS NOT
22 NECESSARILY AN EFFICIENT USE OF TIME. LET ME JUST -- BEFORE
23 WE TAKE A BREAK BECAUSE WE'VE BEEN ON THE RECORD FOR QUITE A
24 WHILE. I HAVE A QUESTION FOR MR. LERNER.

25 HAVE YOU ENQUIRED AS TO THE AVAILABILITY OF
26 JUDGE KRAMER?

1 MR. LERNER: IT'S FUNNY. TO THE POINT ABOUT
2 INDEPENDENT, I ABSOLUTELY HAVE NOT. I HAVE NOT REACHED OUT.
3 AND THE REASON IS I DID NOT WANT ANYONE TO SUGGEST THAT WE HAD
4 INFLUENCED IN ANY WAY JUDGE KRAMER. HE DOESN'T KNOW UNLESS
5 FOR SOME REASON HE'S BEEN REVIEWING EXPEDITED TRANSCRIPTS.

6 THE COURT: RIGHT.

7 MR. LERNER: I WOULD JUST SUGGEST THAT WE WOULD BE
8 FINE. HIS INFORMATION IS AVAILABLE ON THE JAMS WEBSITE. WE,
9 FACEBOOK HAVE NO OBJECTION. IF I MAY PRESUME TO IMPOSE ON
10 YOUR HONOR UNDER THESE CIRCUMSTANCES SO IT WOULD APPEAR THERE
11 WAS NO CONTACT BY EITHER PARTY. IF YOUR HONOR WANTED TO REACH
12 OUT, THAT'S FINE WITH US.

13 THE COURT: ALL RIGHT. WHAT I SUGGEST IS THE
14 PARTIES MEET AND CONFER DURING THE BREAK AND FIND OUT ABOUT
15 JUDGE KRAMER'S AVAILABILITY. OKAY. AND REPORT BACK TO THE
16 COURT.

17 THE SECOND QUESTION I HAVE OF MR. SCARAMELLINO ABOUT
18 ADMISSION TO THE BAR AND THE LEGAL TEAM. AND THIS WILL JUST
19 TAKE A FEW MOMENTS. WILL THE COURTROOM CLERK, PLEASE, STAND
20 AND SWEAR IN MR. SCARAMELLINO.

21 (WHEREUPON, THOMAS SCARAMELLINO WAS FIRST DULY
22 SWORN.)

23 THE CLERK: PLEASE STATE YOUR FIRST AND LAST NAME
24 AND SPELL IT FOR THE RECORD.

25 MR. SCARAMELLINO: THOMAS SCARAMELLINO, T-H-O-M-A-S,
26 S-C-A-R-A-M-E-L-L-I-N-O.

1 THE CLERK: THANK YOU.

2 THE COURT:

3 Q. GOOD MORNING, MR. SCARAMELLINO.

4 A. GOOD MORNING, YOUR HONOR.

5 Q. ARE YOU ON THE LEGAL TEAM FOR THE SAN FRANCISCO
6 ACTION THAT WAS FILED BY MR. GROSS AND MR. KRAMER FOR NOVEMBER
7 OF 2018?

8 A. I BELIEVE SO, YOUR HONOR.

9 Q. ARE YOU A MEMBER OF THE CALIFORNIA BAR?

10 A. NO, SIR. NO, YOUR HONOR.

11 Q. THERE HAVE BEEN REPRESENTATIONS THAT YOU HAVE BEEN.
12 HAVE YOU -- ARE YOU NOW A MEMBER OF ANY BAR WITHIN THE UNITED
13 STATES?

14 A. NO, YOUR HONOR.

15 MR. RUSSO: TO BE CLEAR, I REPRESENTED HE PASSED THE
16 EXAMS AND IS AWAITING ADMITTANCE.

17 THE COURT:

18 Q. DID YOU PASS THE EXAMS IN CALIFORNIA?

19 A. I PASSED THE CALIFORNIA BAR, YOUR HONOR.

20 Q. YOU DID?

21 A. YES.

22 Q. OKAY. WHEN?

23 A. EARLIER THIS YEAR.

24 Q. THE FEBRUARY BAR?

25 A. YES, SIR.

26 Q. OKAY. THAT'S THE FEBRUARY 2018 BAR, CORRECT?

1 A. YES, YOUR HONOR.

2 THE COURT: ALL RIGHT. AS I SAID, WE'VE BEEN GOING
3 FOR A WHILE. I DO HAVE A FEW MORE QUESTIONS OF YOU,
4 MR. SCARAMELLINO, BUT I NEED TO GIVE THE COURT REPORTER A
5 BREAK. SO WHAT WE'RE GOING TO DO. WE'RE GOING TO BREAK FOR
6 ABOUT A HALF HOUR, AND WE WILL RECONVENE AT 11:10. ALL RIGHT.
7 THANK YOU VERY MUCH, EVERYONE. COURT IS IN RECESS UNTIL TEN
8 MINUTES AFTER 11:00.

9 (WHEREUPON, A RECESS WAS TAKEN.)

10 THE COURT: GOOD MORNING ONCE AGAIN, EVERYONE. THE
11 RECORD SHALL REFLECT THAT ALL COUNSEL ARE PRESENT AT THE
12 COUNSEL TABLE AND ALSO IN THE WITNESS BOX. MR. RUSSO IS WITH
13 HIS COUNSEL -- WITH HIS CLIENTS RATHER IN THE JURY BOX SO THAT
14 THE COURT REPORTER CAN HEAR MR. RUSSO AND HIS CLIENTS BETTER.

15 I WAS IN THE MIDST OF ASKING SOME QUESTIONS OF
16 MR. SCARAMELLINO BEFORE WE BROKE, AND I HAVE A FEW MORE. I
17 REMIND YOU, MR. SCARAMELLINO, THAT YOU REMAIN UNDER OATH.

18 Q. IN YOUR DECLARATION THAT WAS FILED ON JUNE 20TH,
19 2017 -- I'M SORRY -- IN MR. GODKIN'S DECLARATION, HE SAID THAT
20 YOU BEGAN PERFORMING WORK AS HIS LAW CLERK IN THIS LITIGATION
21 AS OF SOME TIME IN JUNE OF 2017; IS THAT CORRECT?

22 A. I SERVED AS A LAW CLERK IN SOMETHING OF THE CAPACITY
23 AS A LEGAL INTERN, YOUR HONOR, FOR MR. GODKIN'S FIRM. I
24 CANNOT TELL YOU THAT THAT TIMEFRAME IS ACCURATE THOUGH. I
25 BELIEVE IT MAY HAVE STARTED PRIOR TO THAT TIMEFRAME.

26 Q. OKAY. HIS DECLARATION WAS DATED JUNE 20TH, 2017.

1 AND HE SAID THAT YOU WERE DOING WORK WITH HIS LAW FIRM ON THIS
2 LITIGATION.

3 A. CORRECT, YOUR HONOR. IF I MAY CLARIFY, I BELIEVE
4 THAT AT THE INCEPTION OF THIS LITIGATION, MR. GODKIN AND I
5 CAME TO AN AGREEMENT, WHICH I BELIEVE WAS MEMORIALIZED IN
6 WRITING THAT IN ORDER TO MANAGE THE COST OF THIS LITIGATION AS
7 WELL AS TO ADDRESS THE LIMITED RESOURCES OF BIRNBAUM & GODKIN
8 IN LITIGATION AGAINST FACEBOOK WHAT WE PERCEIVED TO BE A HIGH
9 STATES ISSUE, THAT IT WOULD BE NECESSARY AND PRUDENT TO HAVE
10 ADDITIONAL RESOURCES. AND THEN MR. GODKIN FELT THAT I WAS
11 QUALIFIED TO PROVIDE THEM. AND SO IN MY VIEW, I HAVE BEEN
12 ACTING IN THAT CAPACITY AS A LEGAL INTERN SINCE THE INCEPTION
13 OF THIS SUIT.

14 Q. SO ARE YOU STILL WORKING FOR MR. GODKIN IN RELATION
15 TO THE MERITS OF THIS LITIGATION?

16 A. YES, YOUR HONOR, I BELIEVE SO.

17 Q. YOU REMAIN IN THAT CAPACITY AS A LAW CLERK OR LEGAL
18 INTERN AS A MEMBER OF THE LEGAL TEAM SUPPORTING THIS
19 LITIGATION?

20 A. YES, YOUR HONOR.

21 Q. OKAY. DID YOU SEVER THE SIX4THREE DROPBOX ACCOUNT
22 WHERE THE DOCUMENTS AND EVIDENCE RELATING TO THIS LITIGATION
23 WAS STORED?

24 A. ON NOVEMBER 20TH I BELIEVE, YOUR HONOR, MR. GROSS
25 AND I SPOKE. AND HE DIRECTED ME TO TAKE ALL MEASURES TO
26 ENSURE THAT MR. KRAMER TO THE BEST EXTENT I COULD -- COULD NOT

1 POSSIBLY ACCESS ANY INFORMATION THAT WE SUSPECTED. IT WOULD
2 BE POSSIBLE FOR HIM TO ACCESS. ALTHOUGH WE WERE NOT CONFIDENT
3 THAT HE COULD IN FACT ACCESS THAT INFORMATION.

4 WE TOOK THESE MEASURES IN AN ABUNDANCE OF CAUTION
5 BASED ON A LETTER FROM, I BELIEVE, MS. MILLER FOR DEFENDANTS.
6 AND AT THAT TIME I SEVERED THE CONNECTIONS TO THE DROPBOX.
7 AND I PRESERVED EVERY SINGLE FILE ON MY LOCAL HARD DRIVE WHICH
8 IS NOW IN THE POSSESSION OF THE FORENSICS FIRM. AS WELL AS
9 BEGAN A PROCESS AT MR. GROSS'S INSTRUCTION WHICH WAS A
10 PAINSTAKING PROCESS TO ATTEMPT TO UPLOAD ALL OF THOSE FILES TO
11 BOX.COM.

12 SO I JUST WANT TO BE CLEAR FOR THE RECORD, YOUR
13 HONOR. CONTRARY TO THE REPEATED ASSERTIONS OF THE DESTRUCTION
14 OF EVIDENCE, IT IS IN FACT THE CASE THAT NOT ONLY WAS THE
15 EVIDENCE PRESERVED, IT WAS DUPLICATED TO ENSURE PRESERVATION
16 OF EVIDENCE. AND ALL OF THIS WAS UNDER THE INSTRUCTION OF
17 MR. GROSS IN ORDER TO CURE ANY POTENTIAL ISSUES ONCE
18 MS. MILLER SENT HER LETTER.

19 Q. SO YOU RECEIVED ADVICE OF COUNSEL MR. GROSS TO
20 PRESERVE THIS INFORMATION?

21 A. TO PRESERVE THE INFORMATION AND TO TRANSFER IT AWAY
22 FROM THE DROPBOX ACCOUNT WHERE IT MAY HAVE BEEN POSSIBLE.
23 ALTHOUGH WE DID NOT THINK THAT MR. KRAMER HAD THIS INFORMATION
24 AT THE TIME. BUT WHERE IT MAY HAVE BEEN POSSIBLE FOR
25 MR. KRAMER TO ACCESS THAT INFORMATION, WE IMMEDIATELY REMOVED
26 IT. WE DIDN'T DELETE ANY FILES. WE MOVED IT SUCH THAT WE

1 COULD ATTEMPT TO ENSURE IN AN ABUNDANCE OF CAUTION THAT
2 MR. KRAMER COULD NOT ACCESS IT.

3 Q. THAT MOVEMENT TOOK PLACE ON NOVEMBER 20TH, 2018?

4 A. IT BEGAN ON NOVEMBER 20TH AND NOVEMBER 21ST, YOUR
5 HONOR, WHERE I SEVERED THE CONNECTION. NOW, YOU HAVE TO
6 UNDERSTAND. AND I'M NOT ENTIRELY CLEAR ON THIS AS WELL. BUT
7 THE WAY DROPBOX WORKS, I BELIEVE, IS THAT YOU HAVE THE ABILITY
8 TO REMOVE FILES FROM OTHERS WHEN YOU OWN THOSE FILES OR
9 FOLDERS. OKAY.

10 WHEN YOU TRY TO ATTEMPT TO DO THAT FOR FILES THAT
11 YOU DO NOT OWN, YOU MAY REMOVE YOUR ACCESS TO THEM. BUT THEY
12 MAY STILL BE ACCESSIBLE TO OTHERS. IT WAS NOT CLEAR TO ME AT
13 THE TIME, AND IT IS STILL NOT CLEAR TO ME TODAY WHICH FILES
14 AND FOLDERS I OWN VERSUS MR. KRAMER OWNS VERSUS A
15 REPRESENTATIVE OF BIRNBAUM & GODKIN OWN. SO I DID EVERYTHING
16 I COULD AND TOOK ALL MEASURES POSSIBLE ON THE ASSUMPTION THAT
17 I DID NOT KNOW THAT INFORMATION TO REMOVE FROM THE DROPBOX
18 BECAUSE I FELT THAT MR. KRAMER COULD POTENTIALLY ACCESS THAT
19 FROM THE CLOUD.

20 ALL OF THAT WENT TO MY LOCAL HARD DRIVE WHICH IS
21 STILL PRESERVED TODAY. FROM MY LOCAL HARD DRIVE, I THEN BEGAN
22 A PROCESS TO PLACE IT ON BOX.COM. BOX.COM IS IN THE FILE
23 STORAGE SERVER OF MR. GROSS'S FIRM. HE GAVE ME A PASSWORD AND
24 AUTHORIZED ME TO MAKE THE TRANSFER. I BEGAN THAT TRANSFER
25 PROCESS, I BELIEVE, ON THE 21ST. I MAY BE MISTAKEN. IT MAY
26 BE THE 20TH OR THE 21ST.

1 PRIOR, I BELIEVE, KNOWING AFTER THE FACT OF ANY
2 BREACH, THAT PROCESS WAS INCREDIBLY CUMBERSOME DUE TO THE
3 LARGE AMOUNT OF FILES. I FIRST ATTEMPTED TO -- I WON'T GET
4 INTO THE BORING DETAILS, BUT I JUST WANT TO BE CLEAR FOR THE
5 RECORD. I FIRST ATTEMPTED TO DRAG AND DROP THE FILES INTO THE
6 BOX.COM WEB INTERFACE THAT I THOUGHT WORKED. I LEARNED MUCH
7 LATER THAT IT DID NOT.

8 Q. WOULD YOU MIND SLOWING DOWN FOR THE COURT REPORTER.

9 A. YES, OF COURSE. I APOLOGIZE. THERE'S A LOT TO
10 COVER HERE. THE LAST TWO WEEKS HAVE BEEN QUITE EVENTFUL. I
11 HAVEN'T GOTTEN MUCH SLEEP.

12 Q. DID YOU SEVER YOUR OWN ACCESS TO THE SIX4THREE
13 DROPBOX?

14 A. I SEVERED MY ACCESS TO THE DROPBOX AND PUT
15 EVERYTHING ON THE LOCAL MACHINE AND THEN ATTEMPTED TO LOAD IT
16 TO BOX.COM. I DID NOT -- TO BE CLEAR CONTRARY TO DEFENDANT'S
17 ALLEGATIONS, I DID NOT DELETE ANY DROPBOX ACCOUNT. I DID NOT
18 DELETE IT ON NOVEMBER 20TH OR 21ST. I DID NOT DELETE IT AFTER
19 ANY COURT ORDER. SO I WANT TO BE VERY CLEAR ABOUT THAT AND,
20 YOU KNOW, INFORMATION THAT IS ON THE FORENSIC FIRM'S HARD
21 DRIVE, THEY SHOULD FEEL FREE. I'M SURE YOUR HONOR WILL ASK
22 FOR IT. I STAND BY THAT POSITION.

23 Q. THANK YOU.

24 A. AND THIS IS THE FIRST TIME I HAD IN TWO WEEKS TO
25 CLARIFY THAT FOR THE RECORD.

26 Q. AND YOU REMAIN AS A MEMBER OF THE LEGAL TEAM ON THE

1 SEPARATE SAN FRANCISCO LAWSUIT; IS THAT CORRECT?

2 A. ARE YOU REFERRING TO THE STYLE FORM LITIGATION?

3 Q. YES. THE STYLE FORM LITIGATION.

4 A. BECAUSE OF THE FAMILIARITY WITH THESE VARIOUS ISSUES
5 THAT BIRNBAUM & GODKIN HAD AND THE STYLE FORM PLAINTIFF
6 LEARNED OF THIS MATTER THROUGH OUR LAWSUIT, I BELIEVE, I
7 ASSUMED THAT I WOULD BE PART OF THAT LEGAL TEAM. I DON'T
8 THINK THERE WAS EVER ANY FORMAL DISCUSSION AMONG US THAT I WAS
9 HENCEFORTH A MEMBER OF THAT LEGAL TEAM. I BELIEVE THAT I JUST
10 ASSUMED THAT I WOULD ONCE THAT LITIGATION GOT GOING.

11 Q. OKAY. ARE YOU FUNCTIONING NOW AS A MEMBER OF THE
12 LEGAL TEAM IN THE STYLE FORM CASE THAT IS THE SAN FRANCISCO
13 LITIGATION?

14 A. I HAVE NOT UNDERTAKEN ANY ACTIVITY IN THE STYLE FORM
15 LITIGATION BEYOND PARTICIPATING IN THE DRAFTING OF A
16 COMPLAINT.

17 THE COURT: ALL RIGHT. I HAVE A QUESTION FOR
18 MR. GODKIN ON THAT THEME. DID YOU PROVIDE MR. SCARAMELLINO
19 ACCESS TO OR A COPY OF CONFIDENTIAL OR HIGHLY CONFIDENTIAL
20 DOCUMENTS PRODUCED BY FACEBOOK PURSUANT TO THE STIPULATED
21 PROTECTIVE ORDER THAT WAS ISSUED ON OCTOBER 24TH, 2016?

22 MS. MEHTA: YOUR HONOR, I APOLOGIZE FOR INTERRUPTING
23 YOUR QUESTIONING. I JUST WANTED TO LODGE AN OBJECTION AND
24 REQUEST THAT IF MR. GODKIN IS GOING TO PROVIDE FACTS AS A
25 PERCIPIENT WITNESS AS OPPOSED TO ADVOCACY AS ADVOCATE, WE
26 REQUEST THAT HE ALSO BE SWORN IN UNDER PENALTY OF PERJURY.

1 MR. MAZZUCCO: YOUR HONOR, ALSO THOMAS MAZZUCCO ON
2 BEHALF OF MR. GODKIN. I'D ALSO OBJECT. WE'VE HAD NUMEROUS
3 DISCUSSIONS TODAY ABOUT WAIVING A PRIVILEGE. THE DEFENSE TEAM
4 FOR FACEBOOK WON'T EVEN CALL IT THE ATTORNEY/CLIENT PRIVILEGE.

5 UNFORTUNATELY MY CLIENT IS THE ATTORNEY. THE HOLDER
6 OF THE PRIVILEGE IS HIS CLIENT. AND WE CANNOT -- WE'RE
7 HAMSTRUNG. WE CANNOT WAIVE THE PRIVILEGE AND TALK ABOUT ANY
8 COMMUNICATIONS THAT MR. GODKIN HAD WITH MR. SCARAMELLINO AND
9 MR. KRAMER. AND, AGAIN, AS I STATED EARLIER, WE HAVE BEEN IN
10 THIS CASE FOR 24 HOURS. OUR GREATEST CONCERN IS THAT THE
11 ATTORNEY/CLIENT PRIVILEGE. THE WORD THEY WON'T USE. THAT'S
12 MENTIONED IN THE BUSINESS AND PROFESSIONS CODE, MENTIONED IN
13 THE EVIDENCE CODE. OFFER THE COURT AN ALTERNATIVE AFTER THERE
14 HAVE BEEN SOME DEPOSITIONS TO DETERMINE WHETHER OR NOT IT IS
15 NECESSARY TO EVEN DEPOSE AN ATTORNEY. THOSE ARE STEPS THAT
16 NEED TO BE TAKEN BECAUSE WE'RE HEADING INTO THE AMERICAN
17 JURISPRUDENCE. THE ATTORNEY/CLIENT PRIVILEGE.

18 WHEN YOU LOOK AT THE BUSINESS AND PROFESSIONS CODE,
19 IT HAS LANGUAGE. IT MAY SOUND OLD. THE LANGUAGE IS VERY
20 IMPORTANT. I KNOW THAT MY OLD COLLEAGUES IN THE DEPARTMENT OF
21 JUSTICE ARE BREACHING ATTORNEY/CLIENT PRIVILEGE ON A WEEKLY
22 BASIS THESE DAYS, BUT I WILL NOT ALLOW MY CLIENT TO DO SO.

23 WHEN YOU LOOK AT BUSINESS AND PROFESSIONS CODE, IT
24 SAYS, "IT IS THE DUTY OF AN ATTORNEY TO DO ALL THE FOLLOWING,
25 E1, TO MAINTAIN THE CONFIDENCES AND AT EVERY PAROL TO HIMSELF
26 OR HERSELF TO PRESERVE THE SECRETS OF HIS OR HER CLIENTS."

1 YOUR HONOR, WE HAVE BEEN IN THIS CASE 24 HOURS.
2 THERE HAS BEEN A LETTER BRIEF FILED WITH THE COURT BY FACEBOOK
3 COUNSEL, AGAIN, AVOIDING THE ISSUE OF THE WORD
4 "ATTORNEY/CLIENT PRIVILEGE." WE REQUEST IF WE NEED TO GO
5 FURTHER THAT THERE BE A FULL BRIEFING SCHEDULE ON THIS.

6 HOWEVER, I DO OFFER AN ALTERNATIVE IN THAT WHEN YOU
7 LOOK AT WHETHER OR NOT ATTORNEYS SHOULD TESTIFY EVEN THE CASES
8 THAT ARE CITED IN THEIR BRIEF, IT'S A PRETTY HIGH STANDARD TO
9 GET THERE. AND YOU GET THERE IF THERE IS NO ALTERNATIVE
10 MEANS. AN ALTERNATIVE MEANS ARE DEPOSITIONS OF OTHERS.

11 MS. MEHTA: YOUR HONOR, MAY I?

12 THE COURT: THAT'S TRUE BUT ALSO THERE IS THE
13 EVIDENCE CODE SECTION 956 ISSUE THAT COUNSEL FOR FACEBOOK HAS
14 BROUGHT UP.

15 MR. MAZZUCCO: AND THAT'S THE ISSUE OF THE CRIME
16 FRAUD ACCEPTANCE.

17 THE COURT: YES.

18 MR. MAZZUCCO: THAT'S A HUGE LEAP FOR THIS COURT OR
19 ANYBODY TO MAKE. THEN NOW YOU'RE INSINUATING THAT THERE'S A
20 CRIME FRAUD EXCEPTION WHICH MEANS THERE'S A RELATIONSHIP
21 BETWEEN THE CLIENT AND THE ATTORNEY TO BREAK THE LAW. THAT
22 INVOKES OTHER PRIVILEGES UNDER THE CONSTITUTION AND IT'S A
23 HEAVY PATH TO GO WITHOUT PROPER BRIEFING AND WITHOUT PROPER
24 PROFFER. AND SO AT THIS POINT IN TIME I WILL ADVISE MY CLIENT
25 NOT TO RESPOND TO THE QUESTIONS, YOUR HONOR.

26 THE COURT: VERY WELL. VERY BRIEFLY.

1 MS. MEHTA: YES, YOUR HONOR. VERY BRIEFLY. A
2 COUPLE OF THINGS. THE FIRST THING IS WITH RESPECT TO
3 MR. GODKIN'S TESTIMONY WHETHER HE SHOULD BE ANSWERING THESE
4 QUESTIONS, THEY DIRECTLY PUT THESE SUBJECTS AT ISSUE BY
5 SUBMITTING DECLARATIONS FROM MR. KRAMER AND FROM MR. GODKIN
6 AND FOR MR. GROSS LETTERS TO THE COURT PURPORTING TO EXPLAIN
7 HOW ALL OF THIS WENT DOWN INCLUDING STATEMENTS THAT
8 MR. SCARAMELLINO WAS THE ONE THAT GAVE THE ACCESS TO
9 MR. KRAMER.

10 THEY SUBMITTED DECLARATIONS TO THE COURT ABOUT THE
11 LEGAL TEAM AND THE RELATIONSHIP BETWEEN MR. GODKIN AND
12 MR. SCARAMELLINO. AND THEY SAT HERE IN COURT LAST FRIDAY AND
13 PURPORTED TO TELL YOU ALL ABOUT HOW THIS WAS ALL A MISTAKE AND
14 THEY DIDN'T MEAN FOR THIS TO HAPPEN. AND THEY GAVE YOU A
15 BUNCH OF SELF SERVING HALF TRUTHS TO TELL TO YOU CONVINCE YOU
16 THAT THE DISCOVERY SHOULDN'T PROCEED WITH RESPECT TO THE
17 LAWYERS.

18 THIS IS VERY IMPORTANT, YOUR HONOR. ON THE
19 TRANSCRIPT FROM LAST FRIDAY TO YOUR HONOR, MR. GODKIN WHEN
20 OBJECTING TO DISCOVERY FROM THE LAWYERS SAID QUOTE "FIRST OF
21 ALL, THERE HAVE BEEN NO COMMUNICATIONS WITH THIRD PARTIES
22 REGARDING FACEBOOK'S CONFIDENTIAL INFORMATION. NO
23 COMMUNICATIONS." THAT WAS FROM MR. GODKIN EXPLAINING THE
24 LAWYERS HAD NOTHING TO DO WITH THIS.

25 LAST WEEK BEFORE THE PARLIAMENTARY COMMITTEE, A
26 WITNESS NAMED ELIZABETH DENHAM TESTIFIED. ELIZABETH DENHAM IS

1 THE U.K.'S INFORMATION COMMISSIONER. SHE HEADS AN OFFICE
2 CALLED THE INFORMATION COMMISSIONER'S OFFICE OF THE UNITED
3 KINGDOM OR THE ICO. AT THAT HEARING, SHE TESTIFIED TO
4 PARLIAMENT QUOTE, "WE HAVE HAD A CONVERSATION WITH SIX4THREE.
5 WE TALKED TO THEIR LAWYERS." WHO AT THE TIME BECAUSE OF THE
6 SEALING OF THE RECORDS WERE UNABLE TO SHARE THE EVIDENCE IN AN
7 EMAIL WITH OUR OFFICE.

8 SO MR. GODKIN SAT HERE IN COURT LAST WEEK AND TOLD
9 YOU THERE HAD BEEN NO COMMUNICATIONS WITH ANY THIRD PARTIES.
10 AND MS. DENHAM THE U.K.'S INFORMATION COMMISSIONER TESTIFIED
11 TO PARLIAMENT THAT IN FACT SHE HAD SPOKEN WITH SIX4THREE'S
12 LAWYERS ON THOSE FACTS AND HAVING WAIVED PRIVILEGE BY
13 AFFIRMATIVELY PUTTING INTO EVIDENCE THINGS THAT ARE HELPFUL
14 AND ONE HALF OF THE STORY.

15 THEY CANNOT POSSIBLY NOW ATTEMPT TO SHIELD THE OTHER
16 HALF OF THE STORY FROM DISCOVERY. YOUR HONOR IS ENTITLED TO
17 INVESTIGATE THE BREACH OF THIS COURT'S ORDERS BY COUNSEL AND
18 THE LEGAL TEAM OPERATING AT THEIR DIRECTION AND THEIR CLIENT.
19 AND ALL WE ASK IS THAT MR. GODKIN BE PUT UNDER OATH SO HE
20 CAN'T CONTINUE TO PROVIDE HALF OF THE STORY.

21 THE COURT: NOW, THIS IS A SIMPLE LAWSUIT. AT LEAST
22 IT STARTED OFF THAT WAY REGARDING THE CLAIM BY SIX4THREE
23 AGAINST FACEBOOK OVER FACEBOOK'S PREVENTION OF FURTHER
24 PROVISION OF DATA FROM THEIR DATABASE TO SUPPORT THE
25 PLAINTIFF'S APPLICATION.

26 ALL THE INFORMATION GATHERED THEREIN WAS FOR THE

1 EXPRESSED PURPOSE OF PROSECUTING AND DEFENDING THAT LAWSUIT.
2 THAT INFORMATION WAS NOT FOR PUBLIC CONSUMPTION PURSUANT TO
3 THE PROTECTIVE ORDER OF OCTOBER 2016 AND MY SUBSEQUENT ORDER
4 ON THE MOTION TO SEAL.

5 THAT CONFIDENTIAL INFORMATION SHOULD HAVE BEEN
6 CONFINED TO THIS LAWSUIT. THERE SHOULD NOT HAVE BEEN ANY
7 CONVERSATIONS WITH THIRD PARTIES ABOUT MATTERS OUTSIDE OF THE
8 MERITS OF THIS LAWSUIT OR MATTERS CONCERNING CONFIDENTIAL DATA
9 OR CONFIDENTIAL INFORMATION PROTECTED BY THE MOTION TO SEAL
10 ORDER AND BY THE PROTECTIVE ORDER.

11 IT CONFOUNDS THIS COURT THAT ANYONE SHOULD BE HAVING
12 ANY CONVERSATIONS ABOUT THAT INFORMATION THAT SHOULD BE HELD
13 IN VIOLATE THAT SHOULD BE HELD CONFIDENTIAL. THAT IS JUST AS
14 IMPORTANT AS THE ATTORNEY/CLIENT PRIVILEGE. THESE ARE ALL
15 IMPORTANT CONFIDENTIALITIES THAT ARE RESPECTED BY LEGAL
16 PROFESSIONALS.

17 MR. SCARAMELLINO: YOUR HONOR, MAY I? SIMPLY
18 BECAUSE MS. MEHTA ON A NUMBER OF OCCASIONS CALLED INTO
19 QUESTION OUR MOTIVATION BEHIND THE THIRD PARTY COMMUNICATION.
20 MAY I MAKE A STATEMENT FOR THE RECORD ON THAT SO MY POSITION
21 IS CLEAR?

22 THE COURT: SLOW DOWN FOR THE COURT REPORTER. VERY
23 BRIEFLY, SIR.

24 MR. SCARAMELLINO: THE COMPLAINT FROM SIX4THREE
25 ALLEGES IN ITS VERY FIRST SENTENCE A FRAUDULENT
26 BAIT-AND-SWITCH SCHEME THAT WAS DESIGNED AT LEAST BY 2012. IT

1 FURTHER ALLEGES SECTION 17200 CLAIM THAT IS AT LEAST IN PART
2 CONTINGENT ON AN FTC VIOLATION.

3 IT FURTHER REQUESTS INJUNCTION AND OTHER VARIOUS
4 REMEDIES IN THE PUBLIC INTEREST. SO OUR POSITION AND I
5 UNDERSTAND I HAVE MADE NO EFFORT TO CONVINCE YOUR HONOR OF
6 THIS. AND I UNDERSTAND THAT YOUR HONOR FULLY BELIEVES NARROW
7 COMMERCIAL LITIGATION DISPUTE. I JUST WANT TO BE CLEAR TO
8 EXPLAIN OUR MOTIVATION FOR THIRD PARTY COMMUNICATIONS THAT WE
9 STRONGLY FELT. AND IT IS CLEAR WE PROVIDED A PRIVILEGE LOG
10 RELATED TO THIS INFORMATION THAT WE HAVE DISCUSSED THIS
11 INFORMATION WITH THIRD PARTIES. WE HAVE DISCUSSED PUBLIC
12 ALLEGATIONS.

13 AT NO TIME AND THERE HAS BEEN NO EVIDENCE PRIOR TO
14 THESE EVENTS IN THE U.K. HAS ANY CONFIDENTIAL OR HIGHLY
15 CONFIDENTIAL INFORMATION BEEN EXPOSED TO A THIRD PARTY. IN A
16 NUMBER OF INSTANCES WE DID NOT INITIATE THOSE DISCUSSIONS.
17 THE CALIFORNIA ATTORNEY GENERAL'S OFFICE CALLED US, YOUR
18 HONOR. WE DID NOT REACH OUT TO THEM ON OUR OWN ACCORD.

19 IN A NUMBER OF INSTANCES WE HAVE REACHED OUT TO
20 THIRD PARTIES. SO I JUST WANT TO BE CLEAR OUR POSITION IS
21 THAT THIS IS VERY MUCH IN THE PUBLIC INTEREST THAT FACEBOOK
22 HAS COMMITTED CORPORATE FRAUD AT A MASSIVE SCALE. AND THAT IT
23 SHOULD BE INVESTIGATED BY REGULATORS. AND THAT WAS THE
24 MOTIVATION FOR OUR THIRD PARTY COMMUNICATIONS. IT WAS NOT TO
25 UNDERMINE THE PROTECTIVE ORDER IN THIS LAWSUIT.

26 THE COURT: SO ARE YOU TESTIFYING OR ARGUING?

1 BECAUSE YOU'RE WEARING A DIFFERENT HAT. THAT'S SOMETHING YOUR
2 LAWYER SHOULD BE STATING. YOU'RE NOT A LAWYER. YOU'RE NOT
3 REPRESENTING ANYONE.

4 MR. SCARAMELLINO: YOUR HONOR, THAT'S CORRECT.
5 MS. MEHTA REFERRED TO A PRIVILEGE LAW WHICH MY EMAIL APPEARS
6 REGARDING THIRD PARTY COMMUNICATIONS. SHE THEN IMPUGNED
7 MOTIVATION TO ME REGARDING THOSE MOTIVATIONS. I SIMPLY WANT
8 TO BE ON THE RECORD AND HAVE AN OPPORTUNITY TO BE HEARD
9 PERSONALLY REGARDING MY MOTIVATIONS FOR THOSE THIRD PARTY
10 COMMUNICATIONS, AS IT SPEAKS TO ME PERSONALLY.

11 THE COURT: BUT THE WAY -- YOU'RE TALKING OVER THE
12 COURT, SIR. THAT'S SOMETHING YOU WILL LEARN ONCE YOU'RE
13 ADMITTED TO THE BAR. YOU DON'T TALK OVER THE JUDGE.

14 MR. SCARAMELLINO: I APOLOGIZE, YOUR HONOR.

15 THE COURT: IT'S NOT WELL RECEIVED. LET ME JUST SAY
16 THIS. IT SEEMS AS THOUGH THAT THESE CONCERNS THAT YOU HAVE
17 ARE BROADER THAN THE SCOPE OF THE CONFIDENTIALITY OF THOSE
18 DOCUMENTS. THAT'S WHAT YOU'RE TELLING ME.

19 MR. SCARAMELLINO: I DON'T UNDERSTAND, YOUR HONOR.
20 I APOLOGIZE. CAN YOU CLARIFY?

21 THE COURT: LET ME MAKE IT CLEAR TO YOU. WHAT
22 YOU'RE TELLING ME IS THOSE PUBLIC INTERESTS THAT YOU HAVE ARE
23 BROADER ARE MORE IMPORTANT THAN THE CONFIDENTIALITY ORDERS
24 THAT HAVE BEEN ISSUED BY THIS COURT?

25 MR. SCARAMELLINO: NO, YOUR HONOR. THAT'S
26 DEFINITELY NOT WHAT I'M SAYING.

1 THE COURT: WELL, THE INFERENCE LOOMS LARGE OVER THE
2 CONVERSATION THAT WE ARE HAVING NOW.

3 MR. SCARAMELLINO: YOUR HONOR, I WAS SIMPLY
4 EXPLAINING OUR MOTIVATION FOR THE THIRD PARTY COMMUNICATION.
5 MS. MEHTA HAS ACCUSED VARIOUS INDIVIDUALS HERE. THE ATTORNEYS
6 FOR THE LEGAL TEAM. BEGINNING IN JANUARY OF 2017 A TWO-YEAR
7 LONG CONSPIRACY LEADING UP TO THE EVENTS IN THE UNITED KINGDOM
8 WHICH IS A VERY BOLD CLAIM THAT STRETCHES MY IMAGINATION TO A
9 VERY SIGNIFICANT DEGREE. THE ONLY EVIDENCE THAT HAS BEEN
10 PROVIDED FOR THIS TWO-YEAR LONG CONSPIRACY LEADING UP TO THE
11 EVENTS IN THE UNITED KINGDOM IS THE FACT THAT WE REACHED OUT
12 TO OTHER THIRD PARTIES.

13 I'M SIMPLY PROVIDING WHAT I BELIEVE TO BE AN
14 ALTERNATIVE. AN ACCURATE EXPLANATION FOR THOSE DISCUSSIONS
15 WITH THIRD PARTIES. AND FURTHER AFFIRMING FOR THE RECORD THAT
16 AT NO TIME HAS EVIDENCE BEEN PRESENTED AT ANY OF THOSE THIRD
17 PARTY COMMUNICATIONS INVOLVED PRIOR VIOLATIONS OF THE
18 PROTECTIVE ORDER. I THINK THAT'S VERY IMPORTANT TO HAVE AN
19 OPPORTUNITY TO BE HEARD ON GIVEN THAT MS. MEHTA BELABORED THIS
20 POINT, YOUR HONOR.

21 THE COURT: SO THERE IS NO PLANTING OF THE SEED TO
22 DISCLOSE AND THE ENTIRE MATTER IS A SURPRISE TO ALL. I THINK
23 I UNDERSTAND YOUR ARGUMENT, SIR. ALL RIGHT. MR. GODKIN AND
24 MR. GROSS, DO YOU HAVE ANYTHING TO ADD BEFORE WE --

25 MR. GROSS: JUST ONE CLARIFYING POINT. MS. MEHTA
26 MENTIONED PREVIOUSLY THAT MR. SCARAMELLINO CONTINUES TO HAVE

1 ACCESS TO HIGHLY CONFIDENTIAL INFORMATION. AND I MADE THAT
2 REPRESENTATION. THAT HAS TO DO WITH THE STIPULATION THAT I
3 PREPARED AND WE FILED EARLIER THIS WEEK, YOUR HONOR.

4 THE COURT: PURSUANT TO THE PROTECTIVE ORDER?

5 MR. GROSS: YES. IT'S PURSUANT TO YOUR PREVIOUS
6 ORDER.

7 THE COURT: YES.

8 MR. GROSS: IT IS TO ALLOW ME TO REMOVE
9 MR. SCARAMELLINO'S ACCESS TO THE ATTORNEYS' ONLY LOCATION ON
10 MY BOX ACCOUNT AND TO PROVIDE THAT ACCESS DIRECTLY TO THE
11 FORENSIC EXAMINER, SO THE FORENSIC EXAMINER CAN PRESERVE IT.
12 WE DON'T HAVE AN OBJECTION WHATSOEVER TO THE FORENSIC EXAMINER
13 MAKING THAT IMAGING.

14 JUST BECAUSE IT'S MY FILE SYSTEM, IT'S IMPORTANT FOR
15 MY FIRM TO CONTROL ACCESS TO THAT SYSTEM, SO WE REACHED A
16 STIPULATION TO PROVIDE THAT MECHANISM, YOUR HONOR. AND THAT'S
17 THE ONLY KNOWN ACCESS THAT I'M AWARE OF OF HIGHLY CONFIDENTIAL
18 INFORMATION. AND I'VE BEEN TRYING TO GET IT RESOLVED.

19 THE COURT: VERY WELL. MR. GODKIN, DO YOU HAVE
20 ANYTHING TO ADD?

21 MR. GODKIN: NO, YOUR HONOR.

22 THE COURT: IF THERE IS NOTHING FURTHER, THE COURT
23 IS GOING TO ISSUE AN ORDER GIVEN THE CURRENT STATE OF AFFAIRS.
24 MS. MEHTA, DID YOU HAVE SOMETHING ELSE?

25 MS. MEHTA: NO FURTHER ARGUMENT. I JUST WANTED TO
26 RAISE THREE QUESTIONS FOR YOUR HONOR. I THINK THAT WE HAVE

1 ADDRESSED MOST OF WHAT WE REQUESTED IN OUR DISCOVERY BRIEF.
2 THE THREE THINGS THAT WE'RE REQUESTING GUIDANCE FROM YOUR
3 HONOR ON ARE, ONE, THE RETURN FOR DESTRUCTION FACEBOOK'S
4 CONFIDENTIAL INFORMATION PROMPTLY GIVEN THESE ONGOING
5 CONCERNS.

6 TWO IS PRESERVATION OF INFORMATION FROM THE LAWYERS
7 GIVEN WHAT WE'VE JUST TALKED ABOUT. AND THE FACT THAT TO THIS
8 POINT NONE OF THE INFORMATION OR DATA POSSESSED BY THE LAWYERS
9 HAVEN'T EVEN BEEN PRESERVED BY THE FORENSIC EXAMINER.

10 AND THEN, THIRD, I UNDERSTAND THAT YOUR HONOR IS IN
11 TRIAL NEXT WEEK. HOWEVER, GIVEN THE WAY THAT ALL OF THIS HAS
12 GONE AND THE NEXT STEPS THAT NEED TO BE TAKEN, IF YOUR HONOR
13 HAS TIME FOR ANOTHER CONFERENCE WITH THE PARTIES TOWARDS THE
14 END OF NEXT WEEK, WE WOULD VERY MUCH APPRECIATE AN OPPORTUNITY
15 TO CHECK IN WITH YOU ON ALL OF THIS. AND A TIMELINE FOR WHAT
16 WILL HAPPEN BETWEEN NOW AND THEN AND WHAT WILL HAPPEN AFTER
17 THAT CONFERENCE.

18 THE COURT: ALL RIGHT. WELL, NO, I DON'T HAVE TIME
19 NEXT WEEK. HOWEVER, I DO HAVE TIME ON DECEMBER 17TH AT
20 9:00 A.M. WE'RE GOING TO BE SETTING A DISCOVERY CONFERENCE ON
21 THAT DATE PURSUANT TO THE ORDER I'M GOING TO ISSUE.

22 MR. GROSS: YOUR HONOR, I APOLOGIZE. AND I DON'T
23 WANT TO -- IF -- YOUR HONOR, HERE IS THE ISSUE. IF YOUR ORDER
24 IS GOING TO COVER DISCOVERY FROM THE ATTORNEYS, THEN THERE ARE
25 ISSUES THAT WE HAVE NOT DISCUSSED HERE. AND SO I DON'T WANT
26 TO SPEND MORE OF THE COURT'S TIME IF THE CURRENT ORDER THAT

1 YOU'RE GOING TO ISSUE DOES NOT COVER THE ATTORNEYS.

2 THE COURT: IT DOESN'T.

3 MR. GROSS: OKAY.

4 THE COURT: IT'S NOT RELEVANT. THIS IS WHAT I'M
5 GOING TO DO. I'M GOING TO ISSUE MY ORDER NOW. AND I WANT TO,
6 FIRST OF ALL, MEMORIALIZE SOME ORDERS THAT I HAD ISSUED IN THE
7 PREVIOUS HEARING ON NOVEMBER 30TH, 2018, BUT FAILED TO HAVE IN
8 MY ORDER.

9 TO THAT EXTENT, TO THE EXTENT THAT IT'S NOT
10 REFLECTED IN THE NOVEMBER 30TH, 2018, ORDER, THE COURT
11 HEREBY RE-OPENS DISCOVERY. THAT WAS AS OF NOVEMBER 30TH, FOR
12 THE LIMITED PURPOSE OF PLAINTIFF, PLAINTIFF'S COUNSEL
13 MR. DAVID GODKIN, MR. STUART GROSS AND THE LAW CLERK THOMAS
14 SCARAMELLINO, AND PLAINTIFF PRINCIPAL THEODORE KRAMER'S
15 DISCLOSURE, DISSEMINATION, DISTRIBUTION AND/OR DESTRUCTION, OR
16 ATTEMPT THERETO, OF DEFENDANT FACEBOOK, INC.'S CONFIDENTIAL
17 AND HIGHLY CONFIDENTIAL DOCUMENTS AND VIOLATION OF THE COURT'S
18 ORDERS, INCLUDING BUT NOT LIMITED TO LETTERS AND DECLARATIONS
19 PROFFERED ON BEHALF OF PLAINTIFF SIX4THREE LLC, MR. KRAMER OR
20 MR. SCARAMELLINO, WHILE THE ACTION IS STAYED PENDING THE
21 CROSS-APPEALS ON FACEBOOK AND THE INDIVIDUAL DEFENDANTS'
22 ANTI-SLAPP MOTIONS. MERITS BASED DISCOVERY REMAINS STAYED.

23 SECOND, THE COURT WILL CONSIDER EX PARTE
24 APPLICATIONS FOR SHORTENING TIME ON DISCOVERY MOTIONS.

25 THIRD, THE COURT EXPECTS BOTH PLAINTIFF, INCLUDING
26 MR. KRAMER, AND PLAINTIFF'S COUNSEL TO COOPERATE WITH THE

1 EXPEDITED DISCOVERY.

2 FOURTH, DEFENDANT'S MOTION FOR ANTI-SLAPP ATTORNEY
3 FEES CURRENTLY SCHEDULED FOR TODAY'S DATE DECEMBER 7TH, 2018,
4 IS HEREBY CONTINUED TO JANUARY 11TH, 2019 AT 9:00 A.M.

5 AND, FINALLY, I HAD INDICATED ON THE RECORD. AND
6 YOU WERE PRESENT TODAY BUT NEVERTHELESS THE DISCOVERY
7 CONFERENCE WAS SCHEDULED FOR DECEMBER 7TH, 2018, TODAY'S DATE.

8 NOW, WITH REGARD TO FACEBOOK'S EX PARTE APPLICATION,
9 DEFENDANT'S EX PARTE IS GRANTED. MR. THOMAS SCARAMELLINO, TO
10 BE ACCOMPANIED BY PLAINTIFF'S COUNSEL DAVE GODKIN AND STUART
11 GROSS AND HIS AND MR. KRAMER'S INDIVIDUAL COUNSEL JACK RUSSO,
12 SHALL APPEAR BEFORE A THIRD PARTY FORENSIC EXAMINER ERIC
13 FRIEDBERG OF STROZ FRIEDBERG OR HIS AGENTS AT STROZ FRIEDBERG,
14 101 MONTGOMERY STREET, SUITE 2200, SAN FRANCISCO, CALIFORNIA
15 ON DECEMBER 7, 2018, AT 1:00 O'CLOCK PACIFIC STANDARD TIME OR
16 AN EARLIER DATE AND TIME AGREED TO BY THE FORENSIC EXAMINER
17 AND THE PARTIES. PURSUANT TO THE STIPULATION OF
18 MR. SCARAMELLINO, THAT IS THE STIPULATION THAT WAS REFERRED TO
19 IN THE OPPOSITION TO THE EX PARTE.

20 MR. SCARAMELLINO SHALL RESET THE PASSWORDS FOR ALL
21 OF HIS AND/OR SIX4THREE'S DROPBOX ACCOUNTS, INCLUDING BUT NOT
22 LIMITED TO THE FIVE USER NAMES HE PROVIDED TO THE FORENSIC
23 EXAMINER ON DECEMBER 1, 2018 AND ANY OTHER ACCOUNTS NOT
24 PREVIOUSLY DISCLOSED, BY INITIATING A PASSWORD RESET.
25 MR. SCARAMELLINO SHALL FOLLOW DROPBOX'S PASSWORD RESET
26 PROCEDURES TO GAIN ACCESS TO THESE ACCOUNTS. THIS INCLUDES

1 ANY NECESSARY MULTIFACTOR AUTHENTICATION CREDENTIALS REQUIRED
2 TO ACCESS THESE ACCOUNTS. MR. SCARAMELLINO SHALL BRING ANY
3 DEVICES OR LOGIN CREDENTIALS REQUIRED TO ACCESS THESE ACCOUNTS
4 BY MULTIFACTOR AUTHENTICATION CREDENTIALS TO THE EXAMINATION.

5 THE FORENSIC EXAMINER SHALL SET NEW DROPBOX
6 PASSWORDS FOR THESE ACCOUNTS, MAINTAIN CHAIN OF CUSTODY, TAKE
7 ALL MEASURES TO RESTRICT ACCESS TO, AND PRESERVE THE DATA IN
8 THESE DROPBOX ACCOUNTS, INCLUDING BUT NOT LIMITED TO IMAGING,
9 FOR PRESERVATION OF THE EVIDENCE UNTIL FURTHER OF THE COURT.
10 DEFENDANT'S COUNSEL ARE PERMITTED TO BE PRESENT FOR THE
11 EXAMINATION. NO OTHER PERSON, PARTY, OR COUNSEL SHALL RESET
12 THE LOGIN CREDENTIALS TO GAIN ACCESS TO THESE ACCOUNTS UNTIL
13 FURTHER ORDER OF THE COURT.

14 MR. KRAMER SHALL ALSO APPEAR AT THE EXAMINATION.
15 MR. SCARAMELLINO AND MR. KRAMER AS ADMINISTRATOR OF THE
16 SIX4THREE'S DROPBOX ACCOUNTS, SHALL TAKE ALL STEPS POSSIBLE,
17 UNDER THE FORENSIC EXAMINER'S SUPERVISION AND DIRECTION, TO
18 RECOVER THE DELETED DROPBOX ACCOUNT OR ACCOUNTS, INCLUDING BUT
19 NOT LIMITED TO, REQUESTING REACTIVATION OF THE ACCOUNT AND
20 REQUESTING ANY AND ALL AVAILABLE RECORDS OR LOGS OF THE
21 ACCOUNT OR ACCOUNTS FROM DROPBOX.

22 THIS INCLUDES ANY NECESSARY MULTIFACTOR
23 AUTHENTICATION CREDENTIALS REQUIRED TO ACCESS THESE ACCOUNTS.
24 MR. KRAMER AND MR. SCARAMELLINO SHALL BRING ANY DEVICES OR
25 LOGIN CREDENTIALS REQUIRED TO ACCESS THESE ACCOUNTS BY
26 MULTIFACTOR AUTHENTICATION CREDENTIALS TO THE EXAMINATION.

1 THE FORENSIC EXAMINER SHALL SUPERVISE AND PROVIDE
2 MR. KRAMER AND MR. SCARAMELLINO WITH ACCESS TO LAPTOPS OR
3 COMPUTERS IN HIS CUSTODY IF NECESSARY FOR THE MULTIFACTOR
4 AUTHENTICATION AND MAINTAIN THE CHAIN OF CUSTODY. ONCE
5 RECOVERED, THE FORENSIC EXAMINER SHALL SET A NEW DROPBOX
6 PASSWORD FOR THIS ACCOUNT, MAINTAIN CHAIN OF CUSTODY, TAKE ALL
7 MEASURES TO RESTRICT ACCESS TO, AND PRESERVE THE DATA IN THIS
8 DROPBOX ACCOUNT, INCLUDING BUT NOT LIMITED TO IMAGING, FOR
9 PRESERVATION OF THE EVIDENCE UNTIL FURTHER ORDER OF THE COURT.
10 NO OTHER PERSON, PARTY, OR COUNSEL SHALL RESET THE LOGIN
11 CREDENTIALS TO GAIN ACCESS TO THIS ACCOUNT UNTIL FURTHER ORDER
12 OF THE COURT.

13 THE COURT CLARIFIES THE NOVEMBER 30TH ORDER
14 REGARDING STORAGE OR BACK-UP DEVICES FOR LAPTOPS AND/OR,
15 RESPECTIVELY, MOBILE DEVICES. THIS ORDER INCLUDES AND
16 ENCOMPASSES ANY PHYSICAL FORMATS, INCLUDING BUT NOT LIMITED TO
17 USB THUMB DRIVES, DVDS, EXTERNAL HARD DRIVES OR SERVERS.
18 THOSE ARE PHYSICAL STORAGE DEVICES. AND ANY SERVICES OR
19 STORAGE IN THE CLOUD FOR ANY INTERNET OR APP-BASED SERVICE
20 ACCESSED BY LAPTOP AND/OR A MOBILE DEVICE, INCLUDING BUT NOT
21 LIMITED TO VIDEOCONFERENCING. FOR EXAMPLE, GOOGLE HANGOUTS,
22 MESSAGING PLATFORMS. FOR EXAMPLE, WHATSAPP? EMAIL PLATFORMS
23 SUCH AS GMAIL, FILE OR DOCUMENT MANAGEMENT SUCH AS GOOGLE
24 DRIVE OR DOCUMENT EDITING PLATFORMS. FOR EXAMPLE, GOOGLE DOCS
25 OR CLOUD STORAGE. THE ENUMERATED LISTS IN THE NOVEMBER 30TH
26 ORDER AND THE INSTANT ORDER ARE NOT TO BE CONSIDERED LIMITING.

1 AT THE EXAMINATION, MR. SCARAMELLINO SHALL IDENTIFY,
2 IN WRITING, ALL PHYSICAL STORAGE DEVICES AND CLOUD STORAGE,
3 NOT PREVIOUSLY PROVIDED TO THE FORENSIC EXAMINER, AND
4 MR. SCARAMELLINO SHALL MAKE ANY LOG-IN INFORMATION NECESSARY
5 FOR THE FULL AND COMPLETE ACCESS TO ALL DATA IN HIS CLOUD
6 STORAGE, INCLUDING BUT NOT LIMITED TO HIS GMAIL ACCOUNT,
7 THOMAS.SCARAMELLINO@GMAIL.COM, AND ALL ASSOCIATED CLOUD
8 SERVICES, INCLUDING GOOGLE DRIVE.

9 THIS INCLUDES ANY NECESSARY MULTIFACTOR
10 AUTHENTICATION CREDENTIALS REQUIRED TO ACCESS THESE ACCOUNTS
11 BY MULTIFACTOR AUTHENTICATION CREDENTIALS TO THE EXAMINATION.
12 THE FORENSIC EXAMINER SHALL SUPERVISE AND PROVIDE MR. KRAMER
13 WITH ACCESS TO HIS LAPTOP OR COMPUTER IN HIS CUSTODY IF
14 NECESSARY FOR MULTIFACTOR AUTHENTICATION AND MAINTAIN CHAIN OF
15 CUSTODY. THE FORENSIC EXAMINER SHALL PROMPTLY TAKE ALL
16 MEASURES TO PRESERVE THE DATA IN MR. SCARAMELLINO'S CLOUD
17 STORAGE, INCLUDING BUT NOT LIMITED TO IMAGING, FOR
18 PRESERVATION OF THE EVIDENCE UNTIL FURTHER ORDER OF THE COURT.

19 MR. SCARAMELLINO SHALL NOT OPEN, ACCESS, MODIFY OR
20 DELETE ANY CLOUD STORAGE UNTIL THE FORENSIC EXAMINER'S WRITTEN
21 NOTIFICATION TO ALL PARTIES AND COUNSEL OF RECORD OF THE
22 COMPLETION OF THE PRESERVATION OF EVIDENCE OF
23 MR. SCARAMELLINO'S CLOUD STORAGE.

24 AFTER NOTIFICATION, MR. SCARAMELLINO MAY THEN
25 CONTINUE TO USE THE CLOUD STORAGE, BUT SHALL NOT DELETE ANY
26 DATA FROM THE CLOUD STORAGE UNTIL FURTHER ORDER OF THE COURT.

1 IF THE FORENSIC EXAMINER REQUIRES CONTINUED ACCESS TO
2 MR. SCARAMELLINO'S CLOUD STORAGE FOR THE PRESERVATION OF
3 EVIDENCE, MR. SCARAMELLINO IS EXPECTED TO COOPERATE IN
4 PROVIDING SUCH ACCESS. THE FORENSIC EXAMINER SHALL REPORT TO
5 THE COURT AND CC: ALL THE PARTIES OR THEIR COUNSEL OF RECORD
6 SHOULD ANY DISPUTES OR OBJECTIONS BE RAISED.

7 AT THE EXAMINATION, MR. KRAMER SHALL IDENTIFY, IN
8 WRITING, ALL PHYSICAL STORAGE DEVICES AND CLOUD STORAGE, NOT
9 PREVIOUSLY PROVIDED TO THE FORENSIC EXAMINER. AND
10 MR. SCARAMELLINO SHALL MAKE ANY LOG-IN INFORMATION NECESSARY
11 FOR THE FULL AND COMPLETE ACCESS TO ALL DATA IN ITS CLOUD
12 STORAGE. THAT IS TO SAY MR. KRAMER SHALL DO THAT AND
13 INCLUDING BUT NOT LIMITED TO HIS GMAIL ACCOUNT, ANY NECESSARY
14 MULTIFACTOR AUTHENTICATION CREDENTIALS REQUIRED TO ACCESS
15 THESE ACCOUNTS ARE TO BE PROVIDED.

16 MR. KRAMER SHALL BRING ANY DEVICES OR LOGIN
17 CREDENTIALS REQUIRED TO ACCESS THESE ACCOUNTS BY MULTIFACTOR
18 AUTHENTICATION CREDENTIALS TO THE EXAMINATION. THE FORENSIC
19 EXAMINER SHALL SUPERVISE AND PROVIDE MR. KRAMER WITH ACCESS TO
20 HIS LAPTOP OR COMPUTER IN HIS CUSTODY IF NECESSARY FOR
21 MULTIFACTOR AUTHENTICATION AND MAINTAIN CHAIN OF CUSTODY. THE
22 FORENSIC EXAMINER SHALL PROMPTLY TAKE ALL MEASURES TO PRESERVE
23 THE DATA IN MR. KRAMER'S CLOUD STORAGE, INCLUDING BUT NOT
24 LIMITED TO IMAGING, FOR PRESERVATION OF THE EVIDENCE UNTIL
25 FURTHER ORDER OF THE COURT.

26 MR. KRAMER SHALL NOT OPEN, ACCESS, MODIFY OR DELETE

1 ANY CLOUD STORAGE UNTIL THE FORENSIC EXAMINER'S WRITTEN
2 NOTIFICATION TO ALL PARTIES AND COUNSEL OF RECORD OF THE
3 COMPLETION OF THE PRESERVATION OF MR. KRAMER'S CLOUD STORAGE.
4 AFTER A NOTIFICATION, MR. KRAMER MAY THEN CONTINUE TO USE THE
5 CLOUD STORAGE, BUT SHALL NOT DELETE ANY DATA FROM THE CLOUD
6 STORAGE UNTIL FURTHER ORDER OF THE COURT. IF THE FORENSIC
7 EXAMINER REQUIRES CONTINUED ACCESS TO MR. KRAMER'S CLOUD
8 STORAGE FOR THE PRESERVATION OF EVIDENCE, MR. KRAMER IS
9 EXPECTED TO COOPERATE IN PROVIDING SUCH ACCESS. THE FORENSIC
10 EXAMINER SHALL REPORT TO THE COURT AND CC: ALL PARTIES OR
11 THEIR COUNSEL OF RECORD SHOULD ANY DISPUTES OR OBJECTIONS BE
12 RAISED.

13 MR. KRAMER, WHAT IS YOUR GMAIL ADDRESS?

14 MR. KRAMER: THEODORE.KRAMER@GMAIL.COM, YOUR HONOR.

15 THE COURT: VERY WELL. SO YOUR GMAIL ACCOUNT
16 THEODORE.KRAMER@GMAIL.COM AND ALL ASSOCIATED CLOUD DRIVES
17 INCLUDING GOOGLE DRIVES SHALL BE AVAILABLE AND FULL AND
18 COMPLETE ACCESS THERETO IS WARRANTED. OKAY?

19 MR. KRAMER: YES, SIR.

20 THE COURT: ALL RIGHT. IF MR. SCARAMELLINO OR
21 MR. KRAMER HAVE IDENTIFIED ANY PHYSICAL STORAGE DEVICES NOT
22 PREVIOUSLY PROVIDED TO THE FORENSIC EXAMINER, THEY SHALL MAKE
23 THE PHYSICAL STORAGE DEVICES AVAILABLE FOR PICK UP BY THE
24 FORENSIC EXAMINER AT THE EXAMINATION. THE FORENSIC EXAMINER
25 SHALL PICK UP, MAINTAIN CHAIN OF CUSTODY, TAKE ALL MEASURES TO
26 RESTRICT ACCESS TO, AND PRESERVE THE DATA ON THE PHYSICAL

1 STORAGE DEVICES, INCLUDING BUT NOT LIMITED TO IMAGING, FOR
2 PRESERVATION OF THE EVIDENCE UNTIL FURTHER ORDER OF THE COURT.

3 GOOD CAUSE APPEARS FOR THESE MEASURES TO PRESERVE
4 EVIDENCE GIVEN THE FINDINGS ENUMERATED IN THE NOVEMBER 30TH
5 ORDER IN ADDITION TO THE EVIDENCE PROFFERED BY PLAINTIFF,
6 PLAINTIFF'S COUNSEL, MR. KRAMER, MR. SCARAMELLINO AND
7 DEFENDANT. THE COURT ORDERS THAT THE FORENSIC EXAMINER SHALL
8 CONTINUE TO NOT DISCLOSE ANY DATA PRESERVED OR COLLECTED IN
9 THIS ACTION TO ANY PARTY, NON-PARTY, PERSON OR ENTITY, UNTIL
10 FURTHER ORDER OF THE COURT.

11 WITH REGARD TO THE DISCOVERY CONFERENCE ON
12 DECEMBER 5TH, 2018, THE COURT RECEIVED A REDACTED VERSION AND
13 UNREDACTED VERSION OF DEFENDANT'S DISCOVERY LETTER BRIEF.
14 AGAIN, I'M REITERATING THAT IT IS THE COURT'S UNDERSTANDING
15 THAT THE UNREDACTED VERSION INCLUDES CONFIDENTIAL SETTLEMENT
16 DISCUSSIONS, WHICH IS IMPROPER. THE COURT HAS ONLY READ AND
17 REVIEWED THE REDACTED VERSION AND NOT THE UNREDACTED VERSION.
18 THE DEFENDANT'S COUNSEL DURIE TANGRI, LLP IS ADMONISHED FOR
19 INCLUDING CONFIDENTIAL SETTLEMENT DISCUSSIONS TO THE COURT.
20 THAT WILL BE REFLECTED AND IS HEREBY REFLECTED IN THIS ORDER.

21 THIS COURT SETS A FURTHER DISCOVERY CONFERENCE ON
22 MONDAY, DECEMBER 17TH, 2018 AT 9:00 A.M. IN THIS DEPARTMENT
23 DEPARTMENT 23. THAT CONFERENCE IS LIMITED TO, ONE, THE
24 SELECTION OF A THIRD PARTY INDEPENDENT FORENSIC EXAMINER TO,
25 RUN SEARCH TERMS ON ALL PRESERVED DATA, ET CETERA. AND, TWO,
26 THE SELECTION OF A DEPOSITION REFEREE TO ATTEND THE

1 DEPOSITIONS RELATED TO THIS INQUIRY. COSTS OF THE FORENSIC
2 EXAMINER AND DEPOSITION REFEREE SHALL BE SHARED EQUALLY BY
3 SIX4THREE AND FACEBOOK. PRIOR TO THAT DATE, THE PARTIES SHALL
4 MEET AND CONFER IN ORDER TO STIPULATE TO THE SELECTION. IF
5 THE PARTIES STIPULATE TO THE SELECTION, THE PARTIES SHALL
6 SUBMIT A STIPULATION AND PROPOSED ORDER. IF THE PARTIES ARE
7 UNABLE TO STIPULATE, THE PLAINTIFF AND DEFENDANT SHALL PROPOSE
8 THREE NAMES EACH AND THE RESUMES THEREWITH FOR THE SELECTION
9 OF A FORENSIC EXAMINER AND A DEPOSITION REFEREE TO THE COURT
10 ALONG WITH THEIR DISCOVERY LETTER BRIEFS TO BE FILED AND
11 ELECTRONICALLY SERVED NO LATER THAN FRIDAY, DECEMBER 14TH,
12 2018, AT 12:00 P.M.

13 PERSONAL APPEARANCES ARE REQUIRED BY ALL COUNSEL OF
14 RECORD. HOWEVER, MR. KRAMER AND MR. SCARAMELLINO'S
15 APPEARANCES ARE NOT PRESENTLY ORDERED BY THE COURT. NO
16 TELEPHONIC APPEARANCES ARE PERMITTED. IT IS SO ORDERED.
17 THANK YOU, EVERYONE. THE COURT HAS THE ORIGINAL ORDER AND IS
18 GOING TO EXECUTE THE ORDER IN OPEN COURT.

19 MR. MAZZUCCO: YOUR HONOR, I APOLOGIZE.

20 THE COURT: YES.

21 MR. MAZZUCCO: MR. JAMES KRUZER CO-COUNSEL HAS A
22 FAMILY VACATION SCHEDULED WITH HIS THREE YOUNG CHILDREN ON THE
23 17TH.

24 THE COURT: MR. KRUZER IS EXCUSED.

25 MR. MAZZUCCO: THANK YOU VERY MUCH, YOUR HONOR.

26 MR. KRUZER: THANK YOU, YOUR HONOR.

1 MR. RUSSO: YOUR HONOR, I THINK YOU SAID BY
2 1:00 P.M. PEOPLE WERE GOING TO GET TO SAN FRANCISCO. THAT
3 MIGHT BE HUMANLY POSSIBLE. THEN YOU SAID SOMETHING LIKE "OR
4 EARLIER." I THINK YOU MEANT "OR LATER."

5 THE COURT: I DID MEAN LATER.

6 MR. RUSSO: THANK YOU.

7 MR. SCARAMELLINO: YOUR HONOR, I APOLOGIZE FOR
8 TAKING UP THE COURT'S TIME. I REALLY DO. I JUST WANT TO BE
9 CLEAR. I HAD INFORMED THE FORENSICS FIRM THAT ONE OF THE
10 EMAIL ADDRESSES I PROVIDED I HAVE NOT USED IN SIX YEARS. I
11 WAS TOLD TO PROVIDE EVERYTHING POSSIBLE. IT MAY NOT BE
12 POSSIBLE FOR ME TO ACCESS THAT ACCOUNT. I JUST DON'T WANT
13 THAT TO BE SUBSEQUENTLY USED AGAINST ME. I JUST WANT TO BE
14 CLEAR. ONE EMAIL I HAVE NEVER USED BEFORE. ANY ACCOUNTS THAT
15 I CAN ACCESS, I ASSURE YOU I WILL ACCESS AND COMPLY WITH THE
16 ORDER, BUT I WAS TOLD TO PROVIDE EVERY POSSIBLE EMAIL
17 INCLUDING EMAILS I HAVEN'T USED IN MANY YEARS.

18 THE COURT: ALL RIGHT.

19 MR. SCARAMELLINO: IT'S IN MY DECLARATION. I JUST
20 DON'T WANT THAT TO BE HELD AGAINST ME SUBSEQUENT TO THIS.

21 THE COURT: DULY NOTED. AND COUNSEL HAVE HEARD THIS
22 STATEMENT UNDER OATH IN OPEN COURT.

23 MS. MEHTA: YOUR HONOR, I'M SORRY. ONE LAST POINT
24 OF CLARIFICATION. FACEBOOK'S CONFIDENTIAL INFORMATION THE
25 CONTINUED ACCESS TO IT ON THE OTHER SIDE. WE, AGAIN, HAVE TO
26 REQUEST, YOUR HONOR, THAT THEY RETURN OR DESTROY THAT SO WE

1 DON'T CONTINUE TO HAVE THIS PROBLEM IN THE NEXT TEN DAYS
2 BETWEEN NOW AND WHEN WE SEE YOU AGAIN.

3 THE COURT: SO THIS WILL BE THE HARD COPIES AS WELL
4 AS DIGITAL?

5 MS. MEHTA: THE ELECTRONIC COPIES. WE MADE THE
6 ELECTRONIC COPIES, WE PRODUCED THEM TO THEM. WE DON'T KNOW
7 WHO HAS IT ON THAT SIDE. EVERYONE ON THAT SIDE WHICH INCLUDES
8 OUTSIDE COUNSEL, MR. SCARAMELLINO AND MR. KRAMER AND WHOEVER
9 ELSE THEY HAVE PROVIDED THOSE DOCUMENTS TO VENDORS,
10 CONSULTANTS, ET CETERA, SHOULD RETURN OR DESTROY EVERYTHING
11 AND CERTIFY THAT TO THE COURT BY MONDAY OR TUESDAY OF THIS
12 FOLLOWING WEEK. SO THAT THERE IS NO QUESTION THAT WE'RE NOT
13 GOING TO CONTINUE TO HAVE THIS PROBLEM BETWEEN NOW AND THE
14 NEXT TIME WE SEE YOU YOUR HONOR.

15 THE COURT: ALL RIGHT. WE'RE GOING TO HAVE A
16 DISCOVERY CONFERENCE NEXT WEEK. AND SO I THINK MY ORDER
17 SHOULD STAND WHICH IS NONE OF THIS MATERIAL IS TO BE
18 DISTRIBUTED, DISSEMINATED OR OTHERWISE AS I SAID IN MY ORDER.
19 AND IT SHALL BE PRESERVED. I MADE MY ORDER TODAY IN OPEN
20 COURT AND I EXPECT THAT TO BE FOLLOWED. JUST AS I EXPECTED
21 THE PREVIOUS ORDERS TO BE FOLLOWED.

22 MS. MEHTA: AND, YOUR HONOR, AND I'M SORRY FOR
23 CONTINUING TO PRESS THIS. YOU COULD IMAGINE GIVEN THE CURRENT
24 CIRCUS THAT FACEBOOK IS DEALING WITH AS A RESULT OF THIS
25 SITUATION THAT SIX4THREE HAS MADE, WE DON'T HAVE CONFIDENCE
26 THAT THEY WILL ABIDE BY YOUR HONOR'S ORDER. AND SO WHAT WE

1 WOULD REQUEST IS AT LEAST WITH RESPECT TO THE INDIVIDUALS. SO
2 SET ASIDE FOR A MOMENT COUNSEL. AT LEAST WITH RESPECT TO THE
3 INDIVIDUALS, THAT THEY SHOULD HAVE TO PROVIDE THAT
4 CERTIFICATION TO YOUR HONOR BY MONDAY. WE CANNOT HAVE THE
5 SITUATION WHERE THESE PEOPLE CONTINUE TO POSSESS THAT
6 CONTENTS.

7 THE COURT: I WILL MAKE THAT ORDER NOW. THE
8 INDIVIDUALS INVOLVED IN THIS CASE, MR. SCARAMELLINO,
9 MR. KRAMER, SHALL AFTER THE IMAGING OF ALL OF THIS MATERIAL
10 WHICH IS CRITICAL TO THE PRESERVATION OF THE EVIDENCE RETURN
11 ALL FACEBOOK DOCUMENTS THAT WERE SUBJECT TO THE ORDERS THAT
12 WERE PREVIOUSLY ISSUED FOR CONFIDENTIALITY. THAT IS TO SAY
13 THE PROTECTIVE ORDERS AND THE MOST RECENT ORDER ON THE MOTION
14 TO SEAL.

15 MR. RUSSO: YOUR HONOR, I THINK THE ISSUE IS THEY
16 DON'T HAVE THE COMPUTERS ANYMORE. THE COMPUTERS ARE IN THE
17 POSSESSION OF THE FORENSIC EXAMINER, SO THEY COULDN'T ACTUALLY
18 COMPLY WITH THE REQUEST THAT COUNSEL HAS MADE TO RETURN OR
19 DELETE WHATEVER IS ON THOSE MACHINES. IT SEEMS LIKE THE STEP
20 THAT HAS TO OCCUR. I DON'T KNOW HOW QUICKLY IT COULD OCCUR.
21 THOSE PHYSICAL DEVICES WOULD EVENTUALLY BE RETURNED TO THEM.
22 THEY CAN'T DELETE OR RETURN STUFF THAT THEY CAN'T ACCESS.

23 THE COURT: WELL, THE ORDER WILL STAND THAT NOTHING
24 BE DESTROYED AND EVERYTHING BE PRESERVED. AND THOSE
25 PARTICULAR DOCUMENTS -- OR I'M SORRY -- DEVICES SHOULD
26 PROBABLY BE HELD UNTIL THE NEXT DISCOVERY CONFERENCE. WE

1 COULD DO THAT.

2 MR. RUSSO: YOUR HONOR, WE HAVE DONE IN OTHER CASES
3 THAT IT ENABLES PARTIES TO ACTUALLY GET THEIR MACHINES BACK IS
4 GET THE HARD DRIVES REMOVED. GET THE ACTUAL PHYSICAL MEDIA
5 REMOVED FROM THE MACHINE. THE MACHINE ITSELF, THEY EXIST
6 INDEPENDENT OF THE ACTUAL STORAGE. AND THEN THEY MIGHT
7 POSSIBLY BE ABLE TO BUY SOME NEW HARD DRIVES AND INSTALL THEM
8 AND USE THEIR EQUIPMENT. SEVERAL THOUSAND DOLLARS WORTH OF
9 EQUIPMENT THAT'S ESSENTIALLY LOCKED UP AT THIS POINT.

10 THE COURT: I UNDERSTAND. MS. MEHTA.

11 MS. MEHTA: YES, YOUR HONOR. THERE'S TWO DIFFERENT
12 THINGS WHICH WE'RE TALKING ABOUT HERE. AGAIN, WE'RE OPERATING
13 A BIT IN THE DARK AS TO HOW EXACTLY THIS INFORMATION WAS
14 DISSEMINATED ON THEIR SIDE.

15 THE COURT: RIGHT.

16 MS. MEHTA: BUT WITH RESPECT TO PHYSICAL DEVICES, IF
17 THE HARD DRIVES ARE REMOVED AND MAINTAINED BY THE STROZ
18 FRIEDBERG FORENSIC EXAMINER, WE DON'T HAVE A PROBLEM WITH THE
19 REST OF THE COMPUTER GOING BACK TO THEIR -- TO THE OWNERS OF
20 THAT COMPUTER. AS LONG AS THE HARD DRIVE DOESN'T GO BACK TO
21 THEM BECAUSE OF THE POTENTIAL FOR CONFIDENTIAL INFORMATION.

22 SECONDLY, WITH RESPECT TO MOBILE DEVICES OR OTHER
23 DEVICES THAT MAY ACCESS CLOUD STORAGE OF SOME SORT, WE HAVE
24 THE PROBLEM OF NOT KNOWING WHETHER THERE'S ANY FACEBOOK
25 CONFIDENTIAL INFORMATION IN THE GMAIL OR GOOGLE DRIVE OR
26 WHATEVER. SO I THINK THERE'S ONE WAY TO HANDLE IT WOULD BE TO

1 HAVE THE FORENSIC EXAMINER CHANGE THE PASSWORDS AND NOT GIVE
2 THE PASSWORDS BACK TO THEM UNTIL AT LEAST THE NEXT DISCOVERY
3 CONFERENCE. SO THAT THEN THEY COULD NOT POSSIBLY GET INTO
4 THOSE DEVICES AND DISSEMINATE FURTHER CONFIDENTIAL
5 INFORMATION. THAT IS ONE THING WE WOULD SUGGEST AS A WAY IF
6 THERE'S ANYTHING IN THE CLOUD THAT THEY SHOULDN'T HAVE, THAT
7 THEY DON'T GET TO ACCESS IT BETWEEN NOW AND THE NEXT TIME WE
8 SEE YOUR HONOR.

9 THE COURT: OKAY.

10 MR. SCARAMELLINO: I'M EMPLOYED. AND I USE MY EMAIL
11 FOR WORK. IF I CAN'T ACCESS MY EMAIL FOR WORK THAT HAS
12 NOTHING TO DO WITH THIS CASE, HOW AM I SUPPOSED TO SURVIVE?

13 THE COURT: WHAT YOU SHOULD DO IS DELETE ANYTHING
14 THAT YOU HAVE IN YOUR POSSESSION. OKAY. AND -- OR THAT'S
15 ACCESSIBLE IN THE CLOUD. ALL THAT SHOULD BE GONE. IT SHOULD
16 BE DELETED.

17 MR. SCARAMELLINO: MAY I BE PERMITTED TO USE MY WORK
18 EMAIL?

19 MS. MEHTA: MY SUGGESTION WOULD BE LET'S DO THE
20 FOLLOWING. IF MR. SCARAMELLINO IS SAYING HE NEEDS HIS EMAIL
21 FOR OTHER REASONS, LET'S DO THE FOLLOWING. LET'S GET EVERYONE
22 TO THE FORENSIC EXAMINER THIS AFTERNOON AND LET THEM AS YOU
23 ALREADY ORDERED GET ALL THE EMAILS PRESERVED. ALL OF THE
24 GOOGLE DRIVES PRESERVED. EVERYTHING PRESERVED.

25 AS SOON AS THEY HAVE COMPLETED THE PRESERVATION,
26 THEY CAN RETURN ACCESS TO THE GMAIL, THE GOOGLE DRIVE, AND THE

1 DEVICES TO MR. SCARAMELLINO AND TO MR. KRAMER. AND THEN
2 IMMEDIATELY THEREAFTER, THEY SHOULD TAKE STEPS UNDER THE
3 SUPERVISION OF THEIR COUNSEL TO DELETE ANYTHING THAT WOULD
4 HAVE FACEBOOK CONFIDENTIAL OR HIGHLY CONFIDENTIAL INFORMATION
5 IN IT. THAT WOULD INCLUDE DOCUMENTS WE PRODUCED OR SUMMARIES
6 OR ANY OTHER WORK PRODUCT THAT WOULD HAVE THE SUBSTANCE OF
7 FACEBOOK CONFIDENTIAL INFORMATION AND CERTIFY TO THE COURT
8 WITHIN 48 HOURS OF THE RETURN OF ACCESS TO THEIR DEVICES AND
9 THEIR CLOUD STORAGE. THAT ALL SUCH INFORMATION HAS BEEN
10 DELETED.

11 THE COURT: ALL RIGHT. I THINK THAT'S REASONABLE.
12 MR. RUSSO.

13 MR. RUSSO: YOUR HONOR, I DON'T KNOW WHAT COUNSEL IS
14 GOING TO BE ABLE TO DO WITHOUT WORK PRODUCT, BUT I THINK THERE
15 IS WORK PRODUCT THAT HOPEFULLY WILL EXIST WITH COUNSEL THAT
16 CAN CONTINUE TO EXIST NOTWITHSTANDING DELETIONS.

17 THE COURT: I THINK --

18 MR. RUSSO: MR. SCARAMELLINO HAS WORKED ON THE CASE
19 AND HAS GENERATED WORK PRODUCT.

20 THE COURT: WELL, UNDERSTOOD.

21 MS. MEHTA: THAT'S PRECISELY HOW WE GOT INTO THIS
22 WHOLE PROBLEM. FROM THEM NOW TO BE ARGUING THAT THEY SHOULD
23 CONTINUE TO HAVE IMPROPER ACCESS TO INFORMATION BECAUSE OF
24 THIS LEGAL TEAM THAT THEY CONCOCTED IS ABSURD. I THINK IT IS
25 TIME FOR THE ACCESS TO END AND WHATEVER WORK PRODUCT MAY
26 RESIDE WITH THE LAWYERS, I THINK THE NEXT DISCOVERY CONFERENCE

1 WE WILL PROBABLY TAKE THAT ISSUE UP WITH YOUR HONOR AGAIN OR
2 VIA AN EX PARTE FOR EXPEDITED TREATMENT. BUT MR. SCARAMELLINO
3 CANNOT CONTINUE TO HAVE ACCESS TO FACEBOOK CONFIDENTIAL
4 INFORMATION.

5 THE COURT: I AGREE. I AGREE. WHAT EVERYONE NEEDS
6 TO UNDERSTAND IS THE TRUST THAT ORDINARILY WOULD BE EXISTING
7 WITHIN COUNSEL IN THE CASE HAS BEEN VIOLATED. AND THE
8 DEFENDANT IS HAVING DIFFICULTY RELYING ON THE TRUST THAT'S
9 BROKEN AND THAT IS FULLY APPRECIATED. WE MUST BE CAREFUL TO
10 PRESERVE THE EVIDENCE. AND I THINK AT THIS POINT THE STATUS
11 QUO IN TERMS OF THE -- I CAN'T SAY THAT BECAUSE THAT'S BEEN
12 BROKEN. LET ME JUST SAY THE CONFIDENTIALITY SHALL REMAIN, BUT
13 I DON'T THINK MR. SCARAMELLINO SHOULD HAVE ANY ACCESS TO ANY
14 OF THE DATA IN THIS CASE UNTIL FURTHER COURT ORDER.

15 MS. MEHTA: AND A REQUEST FOR CERTIFICATION FROM
16 BOTH OF THEM TO THAT EFFECT TOO, YOUR HONOR.

17 THE COURT: ALL RIGHT. THERE SHALL BE CERTIFICATION
18 UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
19 CALIFORNIA THAT THEY DO NOT HAVE -- "THEY" MEANING
20 MR. SCARAMELLINO AND MR. KRAMER DO NOT HAVE ACCESS TO ANY
21 DIGITAL OR HARD COPIES OF ANY OF THE CONFIDENTIAL INFORMATION
22 THAT WAS OBTAINED FROM FACEBOOK DURING THE COURSE OF THIS
23 LITIGATION. I'D LIKE THAT -- I'D LIKE TO HAVE THAT ORDER
24 MEMORIALIZED. WILL THE DEFENDANTS DO THAT?

25 MS. MEHTA: YES, YOUR HONOR. WE WILL PREPARE A
26 PROPOSED ORDER.

1 THE COURT: ALL RIGHT. VERY WELL. WITH REGARD TO
2 MY ORDER, I'M GOING TO HAVE TO JUST -- I'LL MAKE SOME
3 INTERLINEATIONS HERE AND DO A REVISED ORDER IF I HAVE TO. I
4 THINK THIS ORDER NEEDS TO BE SIGNED SO THAT EVERYONE KNOWS.

5 IT IS NOW 12:30. CAN THE PARTIES MAKE IT THERE BY
6 2:00? 3:00 P.M. YOU'RE ENTITLED TO LUNCH. SO EVERYONE SHOW
7 UP AT THE STROZ FRIEDBERG FIRM NO LATER THAN 3:00 P.M. ON
8 TODAY'S DATE OR A LATER DATE AS AGREED UPON BY THE FORENSIC
9 EXAMINER AND THE PARTIES. I WILL INITIAL THIS CHANGE. WE'RE
10 GOING TO HAVE TO MAKE THOSE AS WE CONFORM ALL THE REST OF THE
11 ORDERS, MAKE THOSE CHANGES. THE COURT IS EXECUTING THIS ORDER
12 IN OPEN COURT. IT IS SO ORDERED. SO PAGE 2, LINE 26 NEEDS TO
13 BE CONFORMED WITH ALL THE REST OF THE COPIES THAT HAVE BEEN
14 MADE.

15 MR. GROSS: YOUR HONOR, IF I MAY, THE STIPULATION OF
16 THE PROPOSED ORDER CONCERNING THE LOCATION ON MY BOX ACCOUNT
17 THAT WE SUBMITTED, DO YOU HAVE -- WE'D LIKE TO PROVIDE ANOTHER
18 COPY OF THAT. THIS IS TO REMOVE IN PART MR. SCARAMELLINO'S
19 ACCESS TO THAT LOCATION AND COULD DIRECTLY GIVE ACCESS TO THE
20 FORENSIC EXAMINER. THIS IS -- WE -- THE STIPULATION WAS FILED
21 ON, I BELIEVE, TUESDAY.

22 THE COURT: OKAY.

23 MR. GROSS: WOULD YOU LIKE US TO PROVIDE A COURTESY
24 COPY OF THAT, YOUR HONOR?

25 THE COURT: YES.

26 MR. GROSS: OKAY. WE WILL DO THAT.

1 THE COURT: ALL RIGHT.

2 MR. RUSSO: YOUR HONOR, I ASSUME WE'RE NOT GOING TO
3 HAVE A PROBLEM WITH MR. SARGENT ATTENDING THE SAN FRANCISCO
4 SESSION. I'VE GOT A SITUATION IN MY OFFICE I HAVE TO DEAL
5 WITH BY 4:00 O'CLOCK. AND I DON'T THINK I CAN BE IN BOTH
6 PLACES AT THE SAME TIME. MR. SARGENT IS HERE. AND HE'S MY
7 PARTNER AND HE COULD BE WITH THEM FOR THIS EXERCISE.

8 THE COURT: MR. SARGENT, IS THAT SATISFACTORY?

9 MR. SARGENT: YES.

10 THE COURT: ONE OF YOU CAN BE THERE. MR. RUSSO,
11 YOU'RE CERTAINLY FREE TO ATTEND TO THE BUSINESS --

12 MR. RUSSO: THANK YOU.

13 THE COURT: -- THAT IS PRESSING TO YOUR FIRM.

14 MR. RUSSO: THANK YOU.

15 THE COURT: IS THERE ANYTHING FURTHER BY COUNSEL?

16 MR. GROSS: YOUR HONOR, I DON'T HAVE A COURTESY COPY
17 ON ME. I WILL GO PRINT A COURTESY COPY AND COME BACK AND
18 PROVIDE IT TO THE COURT. IS THAT ACCEPTABLE?

19 THE COURT: A COURTESY COPY.

20 MR. GROSS: OF THE STIPULATION. I APOLOGIZE. I
21 SHOULD BE MORE PRECISE.

22 THE COURT: IS THERE ANYTHING FURTHER BY THE
23 DEFENSE?

24 MS. MEHTA: NO, YOUR HONOR. THANK YOU.

25 THE COURT: ALL RIGHT. I EXPECT THAT ORDER TO BE
26 DRAFTED THAT I HAVE SUBMITTED SHARED WITH COUNSEL AND

1 SUBMITTED FOR MY SIGNATURE. THANK YOU VERY MUCH, EVERYONE.

2 WE WILL SEE YOU ON DECEMBER 17TH AT 9:00 A.M.

3 MS. MEHTA: THANK YOU, YOUR HONOR.

4 MR. GODKIN: THANK YOU.

5 THE COURT: COURT IS IN RECESS.

6 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

7 ---OOO---

1 STATE OF CALIFORNIA)

2) SS.

3 COUNTY OF SAN MATEO)

4 I, GERALDINE VANDEVELD, OFFICIAL COURT REPORTER,
5 COUNTY OF SAN MATEO, STATE OF CALIFORNIA, DO HEREBY CERTIFY:

6 THAT THE FOREGOING CONTAINS A TRUE, FULL AND CORRECT
7 TRANSCRIPT OF THE PROCEEDINGS GIVEN AND HAD IN THE
8 WITHIN-ENTITLED MATTER THAT WERE REPORTED BY ME AT THE TIME
9 AND PLACE MENTIONED AND THEREAFTER TRANSCRIBED BY ME OR AT MY
10 DIRECTION INTO LONGHAND TYPEWRITING AND THAT THE SAME IS A
11 CORRECT TRANSCRIPT OF THE PROCEEDINGS.

12 DATED: DECEMBER 12, 2018

13 

14
15 GERALDINE VANDEVELD, C.S.R. #8634
16 OFFICIAL COURT REPORTER
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EXHIBIT 3

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

SIX4THREE, LLC, A DELAWARE LIMITED)
 LIABILITY COMPANY, et al.,) Case No.
) CIV533328

Plaintiffs,)

vs.)

FACEBOOK, INCORPORATED, et al.,)

Defendants.)

**CERTIFIED
TRANSCRIPT**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE V. RAYMOND SWOPE, JUDGE

DEPARTMENT 23

--oOo--

DECEMBER 17, 2018

--oOo--

A P P E A R A N C E S:

For the Plaintiffs: Birnbaum & Godkin
 280 Summer Street
 Boston, Massachusetts 02210

By: DAVID GODKIN, Esq.

Gross & Klein
 The Embarcadero, Suite 100
 San Francisco, California 94111

By: STUART G. GROSS, Esq.

(Appearances continued on next page:)

Reported by: Megan Zalmi, CSR 10925, CRR

A P P E A R A N C E S:

For Birnbaum & Godkin: Murphy Pearson Bradley & Feeney
88 Kearny Street, 10th Floor
San Francisco, California 94108

By: JAMES A. MURPHY, Esq.
JAMES LASSART, Esq.

For Gross & Klein: Wilson Elser
525 Market Street, 17th Floor
San Francisco, California 94105
By: DONALD SULLIVAN, Esq.

For Defendant Facebook: Durie Tangri
217 Leidesdorff Street
San Francisco, California 94111

By: SONAL MEHTA, Esq.
JOSH LERNER, Esq.
LAURA MILLER, Esq.
CATHERINE KIM, Esq.

For Scaramellino and Kramer:
Computer Law Group
401 Florence Street
Palo Alto, California 94301

By: JACK RUSSO, Esq.
CHRISTOPHER SARGENT, Esq.

--oOo--

P R O C E E D I N G S

REDWOOD CITY, CALIFORNIA - DECEMBER 17, 2018

BEFORE THE HONORABLE V. RAYMOND SWOPE, JUDGE, DEPT. 23

-- Morning Session --

THE COURT: Good morning, everyone.

Calling Case No. 533328, this is the matter of
Six4Three versus Facebook, et al.

Will counsel please state their appearances
for the record.

MR. MURPHY: Good morning, Your Honor.
James Murphy on behalf of the law firm of
Birnbaum & Godkin, and Mr. Godkin is present,
David Godkin.

MR. LASSART: And James Lassart, Your Honor.

THE COURT: Good morning.

MR. LASSART: Good morning.

MR. RUSSO: Good morning, Your Honor.
Jack Russo and Chris Sargent for the third-party
witnesses, who are not here with your permission,
Mr. Kramer and Mr. Scaramellino.

THE COURT: Good morning.

MR. RUSSO: Thank you.

MR. SULLIVAN: Good morning, Your Honor.
Don Sullivan for Gross & Klein and Mr. Gross is also
here. And I do apologize for being late.

THE COURT: Good morning, Mr. Sullivan.

1 MS. MEHTA: Good morning, Your Honor.

2 Sonal Mehta, Josh Lerner, Laura Miller, Catherine Kim,
3 and Zachary Abrahamson from Durie Tangri for Facebook.
4 And also here are Paul Grewawal, vice-president, deputy
5 general counsel for litigation from Facebook, and
6 Natalie Nagle, associate general counsel for litigation
7 at Facebook.

8 THE COURT: Good morning. I am going to have
9 to make a disclosure. I don't think it's really that
10 necessary, but I am going to do it, nevertheless.

11 I used to work for Mr. Sullivan's firm nearly
12 30 years ago at Wilson, Elser, Moskowitz, Edelman &
13 Dicker in San Francisco. I also used to work with
14 Mr. Lassart at Ropers, Majeski, Kohn & Bentley over 20
15 years ago. Any connections or affiliations are long
16 past, and I hope that the parties will appreciate the
17 disclosure.

18 And if there's no objection, we'll go forward.

19 All right. I just mentioned that in an
20 abundance of caution.

21 This court has taken considerable time without
22 the pressure of a briefing schedule and has looked at
23 this over the weekend. And the court has reflected on
24 the matters that have occurred in the recent weeks with
25 regard to the violation of the court order and the
26 subsequent release by the House of Commons and so forth.

1 And the court has, therefore, reconsidered certain
2 orders it has previously issued with regard to the
3 matters that are pressing. Therefore, in particular,
4 the order reopening discovery for the limited purpose of
5 investigating the breach of the court orders is vacated.

6 The reason for this is that I agree with
7 Mr. Russo and, essentially, the inferences raised by
8 Facebook, that there may be sufficient information to
9 serve as a basis for a motion for terminating sanctions
10 and for an application for order to show cause re:
11 Contempt that's been issued by the parties.

12 Accordingly, the court is ordering the
13 following: The forensic examiner should preserve and
14 maintain the custody of the data collected pursuant to
15 the court order.

16 The court orders preservation of that data,
17 and nothing shall be disclosed to any of the parties
18 until further order of the Court.

19 The forensic examiner shall not run any search
20 terms at all, unless necessary for the preservation of
21 the data, and such preservation, or necessity, shall
22 only be pursuant to a court order.

23 Second, the court will not appoint a
24 third-party discovery referee, nor will the court
25 appoint a discovery referee for depositions.

26 The court further orders that there shall be

1 no depositions of lawyers in this case until further
2 order of the Court, and there shall be no depositions of
3 Mr. Kramer or Mr. Scaramellino until further court
4 order.

5 This court believes that it is improper to
6 compel attorneys to be subjected to deposition in view
7 of the attorney-client privilege and the attorney work
8 product doctrine protections.

9 In the absence of any further briefing on the
10 motions and without the establishment of the two-step
11 showing that is necessary under
12 Evidence Code Section 956, that two-step showing, the
13 prima facie case and the reasonable relationship between
14 the communication and the crime of fraud has not been
15 established, and we're not there.

16 The deposition of Mr. Scaramellino shall not
17 go forward because he's in a bit of a gray area. Number
18 one, he is a member of the legal team, and, presumably,
19 everything that he would do would be imputed to the law
20 firms that he works for; and, second, he's also an
21 investor in Six4Three. So the deposition of Mr. Kramer
22 shall not go forward, either, as I had said at the
23 outset with the suspension of the discovery order having
24 been made.

25 Now, Facebook has previously sought an
26 expedited briefing on terminating sanctions and

1 contempt, which skips a number of procedural steps.
2 This is improper. Therefore, if it chooses to do so,
3 Facebook, may file its noticed motion for terminating
4 sanctions pursuant to Code of Civil Procedure Section
5 2023.030, with the ordinary briefing schedule pursuant
6 to Code of Civil Procedure Section 1005(b).

7 Further, if it elects to do so, Facebook may
8 make an application for an order to show cause re:
9 Contempt with a properly prepared application and
10 affidavit pursuant to Code of Civil Procedure
11 Sections 1211 and 1211.5, pursuant to
12 Code of Civil Procedure Section 1005(b) upon personal
13 service as is required for any contempt citations, if
14 Facebook elects to do so.

15 With regard to the certification of
16 destruction, Facebook needs to serve the notice of entry
17 of order regarding the return and/or destruction of
18 confidential documents in order for that 48-hour period
19 to begin.

20 MS. MEHTA: That was done on Friday,
21 Your Honor.

22 THE COURT: Very well.

23 The motions for attorneys' fees shall go
24 forward on January 11th, 2019, at nine o'clock a.m.

25 Facebook shall prepare the order based upon
26 what I've just announced on the record.

1 Does everyone understand that?

2 MR. SULLIVAN: Yes, Your Honor.

3 THE COURT: Is that clear with everybody?

4 MR. RUSSO: Your Honor, the one comment I
5 would make on behalf of the individual third parties is
6 that they are in different locations. As you noted,
7 Mr. Scaramellino is located in New York. He lives and
8 works in New York. The 48-hour notification should run
9 from when the devices, which were taken from him in
10 New York, are actually made available to him and,
11 presumably, his counsel of record, which, at least so
12 far, is still Mr. Godkin and his firm.

13 He still is associated with -- working with
14 that firm to comply with your orders. And he, in good
15 faith, wants to do that. And you saw him the last time
16 that he was here. You allowed him not to be here again.
17 He thanks you for that. But, at the present time, he
18 does not have access to those devices. And if you see
19 what played out over the weekend, it was an assertion by
20 counsel for Facebook that we had to somehow cause
21 Mr. Scaramellino to make some deletions over the
22 weekend, because they believed that a notification to
23 our office on Friday afternoon started a 48-hour clock
24 that put the lawyers and our clients in contempt for not
25 doing some sort of keystone cops-type of start deleting
26 stuff.

1 The forensic examiner himself sent a
2 notification saying, my interpretation of the judge's
3 order is the 48 hours starts when I send the
4 notification, which I hope to do by 9:00 a.m., that I've
5 completed my work.

6 At 9:00 a.m. this morning, we received a
7 notification that he has not completed his work. He has
8 partially completed his work. And he gave a detail log
9 of what he's done, what he's not done, and he is
10 effectively saying, I am still working on this.

11 So to avoid an ambiguity of the type that came
12 up this weekend, which, frankly, I thought was
13 outrageous, and I stayed up to submit a declaration to
14 Your Honor Sunday night to express that outrage, because
15 it's along the lines of let's see how many additional
16 cycles we can impose on this court and on these parties.
17 These are individuals. They're complying with your
18 orders.

19 Their counsel is here having flown from the
20 east coast to comply with the orders. They're willing
21 to meet with counsel to comply with your orders, but
22 it's got to be done in some orderly way, which I have to
23 believe means that all of the work should be done by
24 that forensic examiner, and then the 48 hours should
25 start.

26 Technically, if they want to hold

1 Mr. Scaramellino or Mr. Kramer in contempt, they should
2 serve those orders on them. We have accepted them
3 because we want to cooperate. But the reality is if
4 they're going to charge criminal contempt against these
5 individuals, or against these lawyers, as Your Honor has
6 just said, they should do it by the book, following the
7 case law that becomes very clear on this. And I think
8 Your Honor is well aware of that and that's why I think
9 it's being reflected in your orders this morning.

10 But right now where we are their assertions,
11 not withdrawn even up to this morning, even though a
12 demand was made that they be withdrawn, is that my
13 clients and these lawyers are all in contempt of your
14 order saying the 48 hours, from their view, started
15 Friday afternoon when they served the notice of entry
16 that counsel just mentioned. That just can't be the
17 case.

18 Thank you.

19 MS. MEHTA: May I respond, Your Honor?

20 THE COURT: Yes.

21 MS. MEHTA: Your Honor, what Your Honor's
22 order says is that upon notification from the forensic
23 examiner for each account or device, a 48-hour clock
24 runs from that notification or entry of the order,
25 whichever is later, and it is specific to the account or
26 to the device.

1 Mr. Scaramellino and Mr. Kramer have had their
2 cell phones back in their custody for many days now.
3 Many days. They received notification for their Gmail
4 accounts and other accounts on December 8th and
5 December 13th.

6 So if we look at this on a per account or per
7 device basis, which is what the order expressly says and
8 is important, because the whole point of this order was
9 to ensure that Mr. Scaramellino and Mr. Kramer, who are
10 not innocent third parties, but are at the very heart of
11 this, as the principal for Six4Three and a member of the
12 legal team, and the people that themselves committed
13 violations of the court orders.

14 The purpose was to ensure that they couldn't
15 continue to have in their possession Facebook
16 confidential information when they can't be trusted to
17 maintain, inviolate, the protections afforded to that
18 information. They have had for more than 48 hours,
19 since the court entered its order on Friday, those
20 devices back and notification as of December 8th and
21 December 13th that those devices had been preserved, and
22 that started the clock.

23 No one is trying to play games here. As we
24 said last week -- or I guess it was the 7th, we want the
25 information deleted so that people that can't be trusted
26 with it no longer have it.

1 They had it in their possession for days. The
2 order was entered on Friday. They need to delete it
3 right away.

4 THE COURT: All right.

5 MR. MURPHY: Your Honor, could I be heard
6 briefly? James Murphy on behalf of David Godkin and the
7 firm of Birnbaum & Godkin. I think what we just heard
8 points to the conflict that my client has in the ongoing
9 representation of Six4Three. And while we believe the
10 court order should be followed -- we intend to follow
11 the order -- we are in such a position that we cannot
12 discuss this matter. We've been requested to oversee
13 the destruction of the documentation. We can't discuss
14 the issue with Mr. Scaramellino or Mr. Kramer. We are
15 in a conflict that prevents us from representing
16 Six4Three. We are in a conflict that prevents us from
17 discussing the matter with Mr. Scaramellino and
18 Mr. Kramer.

19 Perhaps -- and I am not suggesting to the
20 court how it should rule on this -- but perhaps someone
21 independent of the law firm and independent of Facebook
22 and independent of Mr. Kramer and Mr. Scaramellino
23 oversee the destruction, because that person may very
24 well become a witness. And, as the court has pointed
25 out, the lawyer should not be subject to discovery; so
26 we should have someone independent perform that service.

1 That's just my suggestion, Your Honor.

2 THE COURT: Thank you.

3 MR. MURPHY: Thank you.

4 THE COURT: Thank you, Mr. Murphy.

5 My sense is that there was some haste in
6 compelling the destruction of the evidence, that is,
7 destruction of the confidential documents, because of
8 the risk of further disclosure; is that right?

9 MS. MEHTA: It is absolutely pressing that
10 these individuals not continue to have Facebook
11 confidential information.

12 THE COURT: And, further, what is known is
13 that the declaration of Mr. Godkin and its attachments
14 thereto have been disclosed to the public. We know at
15 least those 250 pages that are attached to Mr. Godkin's
16 declaration are out in the public domain.

17 What is not known is whether the remaining
18 5,000 documents that were subject to the motion to seal
19 and certain redactions, remains in possession or has
20 been disclosed. That's something that Facebook does not
21 know. This is something that I've gathered from the
22 papers and from the previous hearings.

23 So the object of all of this and the
24 destruction of the data is to ensure that
25 Mr. Scaramellino and Mr. Kramer do not further disclose
26 any information that is subject to the motion to seal

1 that I issued last month and the protective order that
2 was issued back in October of 2016.

3 To that end, I am going to make an order again
4 that neither Mr. Scaramellino, nor Mr. Kramer, nor any
5 counsel in this case, shall disclose any of the
6 confidential information subject to my motion to seal
7 the order on my motion to seal and the order of
8 protection, or the protective order, that was issued on
9 October of 2016.

10 Now I've made my order, and any subsequent
11 conduct would be a violation of the order that I just
12 made again. This order is redundant, but I am making
13 it, nevertheless, so that it is at least clear to all
14 counsel and the representatives of the individuals that
15 are allegedly responsible for disclosing this
16 information.

17 MS. MEHTA: Your Honor, just -- I'm sorry if
18 you were in the middle of a thought.

19 THE COURT: I have one more question before we
20 entertain any more questions by counsel.

21 Is Mr. Scaramellino still on the legal team
22 for the Styleforum case as he said under oath?

23 MR. MURPHY: Likely, Your Honor. We're not
24 sure. We believe he's still in the Styleforum case.
25 But that will be terminated shortly. He's no longer
26 involved in this case.

1 THE COURT: Okay. What is going to be
2 terminated shortly?

3 MR. MURPHY: Whatever relationship
4 Mr. Scaramellino may have in the Styleforum case.

5 MS. MEHTA: Your Honor, this is astounding,
6 because Mr. Godkin and Mr. Gross have told us that they
7 are withdrawing and have stated to the Styleforum client
8 that they are withdrawing from representation of
9 Styleforum.

10 We have been trying to get approval of a basic
11 stipulation to extend the deadline to answer to the
12 Complaint or respond to the Complaint in that case, and
13 Mr. Gross and Mr. Godkin can't even approve that
14 stipulation without running it by their client.

15 So the suggestion that Mr. Scaramellino, who
16 is not a licensed lawyer, is continuing to operate on
17 the legal team in that case without any supervision for
18 Mr. Gross and Mr. Godkin is astounding given the
19 circumstances up to now. Either he is or he isn't, and,
20 if he is, somebody that's a licensed lawyer better be
21 supervising his work.

22 MR. MURPHY: Your Honor, I don't think my
23 client needs a lecture on how to practice law, but I
24 appreciate it for my own benefit.

25 The question the court posed was whether
26 Mr. Scaramellino was still part of the legal team on the

1 Styleforum case. My response was: We think he is, but
2 that relationship will be terminated. Styleforum is a
3 separate corporation, a separate client, and there are
4 duties owed to that client by my client.

5 So I am merely trying to answer the court's
6 question. But I can tell you whatever relationship
7 Mr. Scaramellino has in the Styleforum case as part of
8 the legal team, or however you want to characterize it,
9 will be terminated.

10 MR. RUSSO: Your Honor, to answer, just so
11 it's clear, Mr. Scaramellino believes that he is still
12 important, at least for whatever transition to new
13 counsel happens, because they are putting both of these
14 litigants, two separate companies, one involves some
15 gentleman located in Sweden. He's being asked to allow
16 withdrawal of these lawyers. We have no connection with
17 that case. Mr. Scaramellino would expect to do
18 transition work. He would expect to do transition work
19 if new counsel comes into this case.

20 There is a basic issue here, Your Honor, which
21 is the elephant in the room that no one yet is covering,
22 and that is that Facebook has not properly yet brought
23 an actual motion for contempt. They've hinted at it.
24 They haven't followed the rules. They haven't followed
25 the case law.

26 When they do that, there will be a defense

1 based on Section 16 of the protective order that they've
2 been alerted to. That defense, if granted, would maybe
3 streamline some of the problems here. But at least
4 there would be a full and fair hearing and a full and
5 fair record on that defense.

6 THE COURT: Mr. Russo, thank you for that
7 argument, but it's a bit premature, don't you think?

8 MR. RUSSO: It is. But, at some point, we
9 keep getting these jousting maneuvers. You're in
10 violation of the court order if by 5:00 p.m. Sunday
11 night, and they send their reply, when I send to them an
12 email on Saturday, saying, if you can get the managing
13 partner of Durie Tangri to look at this whole thing as a
14 quasi independent attorney and tell me that this court's
15 order can be read the way that you're reading it, which
16 is multiple trips with counsel, multiple iterations to
17 do deletions, a keystone cop's kind of approach, if you
18 can get that managing partner to send me that letter, I
19 will meet and confer with you on Sunday. At 5:01
20 Sunday, right after the 5:00 p.m. deadline would have
21 expired, no, your client has violated a court order, as
22 have these lawyers.

23 We think that's preposterous. The way that
24 she's interpreting your order is preposterous.

25 THE COURT: All right. Well, let's --

26 MS. MEHTA: Your Honor, I'm sorry. I have to

1 say, the suggestion that, as lead counsel for Facebook,
2 that I should need to go check with the managing partner
3 of the firm -- which, by the way, we don't have a
4 managing partner, but we have a three-person management
5 committee, and I am one of the three people on the
6 management committee -- the suggestion from Mr. Russo
7 that, as lead counsel for Facebook, I should have to go
8 check with a grownup about a simple reading of
9 Your Honor's order is offensive and inappropriate.

10 What Your Honor's order says is the clock runs
11 from 48 hours from the time that they get notice that
12 the device is back. What we are asking for is for the
13 information that should never have been in the hands of
14 Mr. Kramer and that Mr. Scaramellino has admitted under
15 oath to misusing needs to be deleted. And to highlight
16 why, apparently, he is still working on this other case.

17 He continues to have access to our
18 confidential information, and he's continuing to work on
19 this legal team -- I don't even know what that means --
20 for another client in another case. It has to stop.

21 Your Honor entered an order, and we're asking
22 for it to be enforced. That's it.

23 THE COURT: All right. What I am going to do
24 is make an order modifying what I had said previously.
25 The object is to destroy the data and to prevent further
26 violations of the court order.

1 So I am going to change that order from 48
2 hours to two court days, two court days for compliance
3 to return for destruction. That might work.

4 Does that give the parties enough time?

5 MR. RUSSO: Everyone on this side, Your Honor,
6 is interpreting it as when the forensic examiner tells
7 us he's completed his work. This morning at 9:00 a.m.,
8 he told us there are things that are still incomplete.
9 There are things that still have not been done. That is
10 an item that we can provide to Your Honor. We think
11 he's signaling he needs more time.

12 We, at this side of the table, have all
13 interpreted it as when he finally says he's done, then
14 all the devices -- and I even suggested to counsel,
15 let's make a joint direction to get the devices here in
16 the courthouse this morning. If he's really done by
17 9:00 a.m., there can be a chain of custody turning those
18 over to the lawyers.

19 THE COURT: Perhaps it would be better to wait
20 until all the work is done by the forensic examiner.

21 And why do you think that that's not
22 appropriate, Mr. Lerner?

23 MR. LERNER: Because, Your Honor, if we step
24 back -- as I understood your orders, you intentionally
25 addressed these devices separately. So, for example,
26 when Mr. Russo and his clients argue, we can't live

1 without certain devices returned to us immediately --

2 THE COURT: That's why I made those orders.

3 MR. LERNER: Right. We treated those
4 differently. For those, they have them back. They have
5 access to all of the confidential information for which
6 they repeatedly ignored Your Honor's orders.

7 So that was why the order was structured to
8 say, when you get a device or an account back, the clock
9 runs for that device or account.

10 What is a complete mystery to me is why
11 Mr. Russo is so intent on delaying this process? What
12 is the issue?

13 He shouldn't have an interest under these
14 circumstances in his client's continuing to have
15 information for which they've repeatedly breached
16 orders, unless I am missing something. I completely
17 miss the reason for wanting to rework orders that make
18 sense as to the conduct so far.

19 THE COURT: Well, I believe the reworking is
20 with regard to the time period for compliance, the two
21 court days as opposed to 48 hours. What I don't want to
22 do is have parties working on weekends and so forth to
23 comply with these orders.

24 MR. LERNER: And understood.

25 THE COURT: I think that's reasonable under
26 the circumstances.

1 MR. LERNER: Understood on the two court days.

2 But what we didn't want to have happen as what
3 is now being requested, which is, rewrite your whole
4 order and once Stroz Friedberg is done with every single
5 device and account, then the two days starts.

6 THE COURT: Well, I don't think, as I am
7 recalling my orders, that it is problematic to address
8 device by device at all.

9 MR. LERNER: Correct. We agree.

10 MR. MURPHY: That's right.

11 MR. RUSSO: Your Honor, it is problematic.

12 THE COURT: Can you tell me why?

13 MR. RUSSO: Because the supervision of counsel
14 was expressly included in what you wanted to have occur.
15 You wanted Mr. Godkin to meet with Mr. Scaramellino
16 presumably on the east coast to do the supervision of
17 that deletion. You wanted Mr. Kramer to meet presumably
18 with Mr. Gross, who is counsel for the company. That
19 can happen. That can probably happen today or tomorrow,
20 the latter.

21 Mr. Scaramellino is in New York. Mr. Godkin
22 is here in San Francisco now. Mr. Godkin's office is in
23 Boston. Somebody is going to have to meet up in a
24 location. We suggested it be one meeting when
25 everything else -- what happens is the forensic examiner
26 says, I am done. Mr. Scaramellino has got to travel to

1 Boston or Mr. Godkin has got to travel to New York.
2 They've got to get together to do this so that there's
3 full compliance with the supervision of counsel clause.
4 That's the reality. And they would expect it. They
5 would say, did Mr. Scaramellino have a supervised
6 lawyer, namely, Six4Three's lawyer, counsel of record,
7 to do this?

8 Now, there's an additional problem that is
9 present, which is counsel has signified that they want
10 to withdraw from the case. They are not returning calls
11 to either Mr. Scaramellino or Mr. Kramer, as I
12 understand it. It's not because they want to be bad
13 people, or they want to upset anything, or they want to
14 violate your orders. It's clear they're getting advice
15 from their own counsel to wait until there's further
16 clarity from the court as to what to do.

17 But at the present time, to imagine a
18 device-by-device approach, multiple trips from New York
19 to Boston, or Boston to New York, or even here in
20 San Francisco, it's just not -- it's just not the normal
21 way things are done.

22 Everyone interpreted the order as it would be
23 one session to do what needs to be done. The forensic
24 examiner even interpreted it that way. They sent an
25 email saying, our interpretation -- this was on Sunday,
26 Sunday morning -- our interpretation as the forensic

1 examiner is the clock starts 48 hours after we give
2 notice, and we're giving you a heads up that we hope to
3 have the work done by 9:00 a.m. Monday.

4 I suggested to counsel, let's just get them to
5 bring all the devices here. There could be a chain of
6 custody then to the lawyers, and maybe some people have
7 to fly out here to get this deletion process to happen.
8 No reply to that, because they're standing on a view
9 that there's already a violation of Your Honor's order.
10 It's that kind of game that we reject, Your Honor. It's
11 not the cooperative approach that should happen. We
12 can't run litigation this way without causing more
13 problems for everyone.

14 THE COURT: There should be a practical
15 approach.

16 MR. RUSSO: Yes.

17 MS. MEHTA: Your Honor, we're not --

18 MR. MURPHY: I agree, Your Honor.

19 And when you take a look at a practical
20 approach, I think -- from my client's standpoint, from
21 my standpoint as the lawyer for the lawyer, we need
22 someone independent, because whoever is going to be
23 certifying that these documents have been destroyed,
24 either in an electronic form or some other form, is
25 going to be a witness. And my client cannot talk with
26 Mr. Scaramellino nor Mr. Kramer in connection with this

1 endeavor that the court has imposed upon my client.

2 We don't have a problem with timing. It's the
3 obligation of my client to certify that all of these
4 records are destroyed when we're in a conflict
5 situation, and we can't discuss those things with
6 Mr. Kramer and Mr. Scaramellino.

7 So an independent third party overseeing it is
8 what I propose.

9 THE COURT: Mr. Sullivan?

10 MR. SULLIVAN: We do second that, Your Honor,
11 as far as Mr. Gross is concerned. He's in the exact
12 same situation. He would have to meet with Mr. Kramer
13 multiple times for each account, for each device when
14 there is a conflict situation. So having an independent
15 person there to certify and monitor the destruction
16 would be, I think, in everyone's interest.

17 MR. LERNER: It is remarkable that we are here
18 because of a lack of supervision. And now the argument
19 is, well, we can't supervise anymore because we have a
20 conflict, which has never been described, by the way,
21 for the court, or for any of us, or to anybody.

22 The briefing that has been made to you so far
23 is an allegation against Facebook that -- it says on its
24 face, we're withdrawing because Facebook made this
25 argument. We've made lots of arguments over the course
26 of this case that have not made counsel seek to

1 withdraw. If they have a conflict, they should identify
2 it, rather than running away from the case for failure
3 to supervise.

4 But, again, what they are seeking to do, and
5 this is a theme, is delay the destruction of these
6 documents for as long as possible. And the order that
7 was previously done did require supervision, absolutely.
8 And for a couple of weeks, that supervision worked.
9 Mr. Godkin and Mr. Gross showed up and supervised
10 things.

11 It is not, obviously, Facebook's doing that
12 this information was stored in different accounts and on
13 different devices. But it is important, based on the
14 facts that we have so far, to get rid of it. And
15 delaying, again, we don't think makes sense. We think
16 that the order that was issued makes a ton of sense as
17 to the separation of devices and when the clock runs.

18 So, on that issue, we don't see a reason to
19 undo all of it, and nor do we understand, at least for
20 the time being, why it is that Mr. Godkin and Mr. Gross
21 have, essentially, fled the scene and say that they
22 can't participate in this.

23 THE COURT: I think Mr. Murphy may have an
24 answer to that.

25 Mr. Murphy?

26 MR. MURPHY: Yes, Your Honor. First of all,

1 we're not seeking delay. We're seeking an independent
2 person to oversee the destruction and certify the
3 destruction.

4 THE COURT: I understand.

5 MR. MURPHY: With respect to the conflicts,
6 I've heard a number of comments made today that show to
7 me, a lawyer who represents a lawyer, that there's a
8 conflict of interests under our
9 Rules of Professional Conduct that prevent my client
10 from representing Six4Three.

11 More importantly, more importantly, those
12 conflicts that counsel wants me to identify cannot be
13 identified except in camera, because those are matters
14 that could impact the representation of Six4Three by
15 some other counsel or implicate the attorney-client
16 responsibilities that my client would have to its
17 client.

18 So we're not suggesting a delay. What we're
19 suggesting is something to take a conflicted lawyer out
20 of the equation, and that could be done with a certain
21 degree of facility. Easy.

22 MR. LERNER: Then let's do it in camera.
23 We're all sitting here based on this assertion that
24 there's a conflict which nobody has identified to date.

25 MR. MURPHY: You don't participate in camera.
26 That's with the court.

1 THE COURT: Right. And then there's the
2 *Costco* case, as to whether or not even an in-camera
3 review would be appropriate under the circumstances.

4 MR. MURPHY: That's correct.

5 THE COURT: In the absence of a 956 claim,
6 which we're not there yet.

7 MR. MURPHY: Right.

8 THE COURT: So there's a certain conundrum
9 that exists.

10 MR. LERNER: Not when counsel agrees to it.

11 MR. RUSSO: Your Honor, the way to, perhaps,
12 unpeel the conundrum, Facebook has to make a choice, it
13 seems to me. If time is of the essence, Facebook has to
14 withdraw its accusations against the lawyers. Facebook
15 has to say, whatever plays out in this story, the
16 lawyers are not going to be charged with criminal
17 contempt, or civil contempt, or any other such claim.
18 The lawyers can continue to represent the company, at
19 least insofar as getting through whatever the next phase
20 of what I see as a satellite litigation, whether it's a
21 contempt proceeding, terminating sanctions, or something
22 else. Facebook can't make assertions against the
23 lawyers as they have and say, Judge, give us expedited
24 hearings. Give us expedited briefing. Give us an
25 expedited procedure. The lawyers are responding to what
26 Facebook is asserting.

1 Counsel has now said, we make lots of
2 assertions. We don't always follow through. It's up to
3 them right now to say, look, we are not going to hold
4 these lawyers responsible. They can continue to
5 represent Six4Three through whatever due process
6 Your Honor outlines should happen here.

7 But doing it the other way, where they want to
8 hold the sword over their head, is going to inevitably
9 lead to this motion that they have filed, and we expect
10 that Mr. Gross will file soon, to withdraw. That is
11 going to change the game in terms of timing because
12 there is no immediate lawyer that will step in to this
13 case. And there have been attempts to find such
14 lawyers, and they're all saying, we can't step into the
15 middle of this. This is like the battlefield. We
16 couldn't possibly get up to speed in this battlefield in
17 less than 90 to 120 days, and we know Facebook is never
18 going to agree to that.

19 So let's do it in an orderly way that
20 understands that Facebook can't have their cake and
21 can't eat it, too. They have to start withdrawing some
22 of these assertions. Right off the bat, they should
23 withdraw that we, our client and these lawyers, are in
24 contempt because at 5:01 p.m. on Sunday, last night, we
25 didn't say, oh, yes, we deleted piecemeal some of these
26 data items. Start there is what I would say, with the

1 committee approval or no committee approval from
2 Durie Tangri.

3 MR. LERNER: I just -- I'm sorry. I am going
4 to pause because I actually feel like this is important.

5 What is the basis for saying to one of the
6 better known attorneys in the Bay Area, go get a senior
7 lawyer to look at this for you in 2018?

8 That is not -- so putting that aside, I am
9 also unclear on this point that keeps on getting raised
10 about the delay here. Everybody started this whole
11 process because people are watching this problem. None
12 of us have the ability right now to go to our clients
13 and say, this protective order that gets signed by the
14 judge and entered and that people follow, protects you.
15 We can't do that right now. And people are paying
16 attention to this.

17 And right now the message is, as long as a
18 lawyer steps in, not for the company, the company's
19 lawyers can flee the scene. They can leave. As long as
20 a lawyer who says, I am here for third parties, even
21 though the two parties are the principal of the company
22 and a member of the legal team, as long as that lawyer
23 steps in and says, let's slow everything down because
24 Facebook can file its motions against Six4Three, and
25 nobody needs any discovery or anything else, let's hit
26 pause and redo everything, what we are here trying to

1 tell Your Honor is that grinds this process to a halt.
2 And what it means, effectively, is there is no expedited
3 relief for a wholesale violation of a protective order.
4 That is the impact of what they're saying here.

5 And with respect to, for example, the
6 discovery we sought, Mr. Russo, as you pointed out to
7 start this hearing, has said to Your Honor, it's true,
8 Facebook should do all of this with no discovery. They
9 don't need anything. They can do it. There's certainly
10 a pretty rich record here. That is true. But he
11 doesn't speak for Six4Three. Six4Three never said, we
12 won't give you the documents. Never said that these
13 documents were privileged. To the contrary, Six4Three
14 laid out a timeline of communications between counsel
15 and the principals on the privileged communications.

16 And even if they hadn't laid out that
17 privileged timeline in open court in order to tell their
18 story, there's no dispute that on this issue, there's a
19 boat load of documents that cannot possibly be
20 privileged, including communications with the committee
21 and communications with the press, which is what led to
22 this in the first place. And you saw in the Partovi
23 deposition and elsewhere, where Mr. Scaramellino openly
24 said, I think we should be airing Facebook's internal
25 documents.

26 So what has happened is, as I said, counsel

1 for the company is apparently gone for now. The
2 company, upon originally having said we'll participate
3 and play ball and supervise, is no longer doing that.
4 And a third party is saying, wait, let's not do any
5 discovery. Just file the motions. Even though, as I
6 said at the beginning, the "third party" is the
7 principal and the legal team.

8 So what we respectfully ask for on this
9 subject is, at the very least, the non-privileged
10 communications that went out. And then, obviously, we
11 would like to be able to address what we've addressed
12 before, which is the waiver that was made in open court,
13 repeatedly, on these issues.

14 Finally, with respect to the lawyers and their
15 participation, we're not going to say right now, no, we
16 don't need to know anything from them. Of course not.
17 Nor is it their fight to raise.

18 THE COURT: Let me just talk about the waiver
19 for a second and get that out of the way.

20 I am not going to make orders on the fly
21 without --

22 MR. LERNER: Understood.

23 THE COURT: But I don't want to hear those
24 references with an expectation that there's going to be
25 a ruling on it in the absence of appropriate briefing, a
26 law-and-motion type of approach, the evidence or

1 declarations attached thereto, to determine whether or
2 not there has been a waiver.

3 And I appreciate your identifying this, but I
4 heard this several times now in the hearings that we've
5 had and today, and the court has no opinion and cannot
6 rule upon any waivers of privilege --

7 MR. LERNER: Right.

8 THE COURT: -- in this case in relation to the
9 breach of the confidentiality agreements and the
10 violation of the protective order and motions to seal.

11 MR. LERNER: We understand and agree, which is
12 why -- I'm sorry, Your Honor. I apologize.

13 THE COURT: But the non-privileged
14 communications are something that should be disclosed
15 post haste, and I don't think any of the counsel object
16 to that. It's just the passage -- it's just the
17 supervision of that information that is the problem.
18 That is the conundrum.

19 MR. MURPHY: It is.

20 THE COURT: Mr. Murphy, yes?

21 MR. MURPHY: That is the conundrum. Because
22 who is going to determine what is privileged and not
23 privileged? And who is going to advise the client
24 accordingly? And my client is conflicted and cannot
25 perform that legal service.

26 I was under the impression we were trying to

1 come up with a simple solution to implement the court's
2 order requiring these devices to be, I guess, gathered
3 together and supervised by someone for their destruction
4 of what is confidential and highly confidential
5 information. I think we've gotten away from that. Now
6 we're going back to the issue of discovery and these
7 other things.

8 THE COURT: Well, again, I vacated my
9 discovery order. What I am concerned about now is
10 compliance with my order regarding the identification
11 and destruction of the confidential information that
12 belonged to Facebook in this litigation.

13 MS. MEHTA: Your Honor, just to take those
14 things separately, because I do think we've started to
15 conflate through the argument of Mr. Russo and a number
16 of other people, a number of different issues.

17 So let's start with destruction. The
18 destruction needs to happen post haste for exactly the
19 reason that you identified on December 7th.

20 THE COURT: Would you be so kind as to slow
21 down for the court reporter.

22 MS. MEHTA: Certainly, Your Honor.

23 THE COURT: Thank you.

24 MS. MEHTA: Post haste for the reason that you
25 identified on December 7th, which is that
26 Mr. Scaramellino and Mr. Kramer have already

1 demonstrated that they cannot be trusted with Facebook
2 confidential information and that they don't have
3 respect for the court's orders governing that
4 information, including the protective order, the sealing
5 order, and the November 20th order specifically
6 instructing Mr. Kramer not to distribute this material.

7 Given that, we ask that the information be
8 immediately destroyed. Your Honor enter an order
9 requiring that that happen on a per device basis,
10 because we are forced to give them back access on a per
11 device or per account basis at their request, at their
12 demand, their insistence that they couldn't possibly go
13 on with their lives without their cell phones and their
14 Gmail accounts.

15 THE COURT: Question -- hold your thought, but
16 question: How do you implement that if Mr. Scaramellino
17 is in New York, Mr. Kramer is out here on the west
18 coast, and there's no company attorney available to
19 supervise that destruction?

20 MS. MEHTA: So, Your Honor --

21 THE COURT: How do you make that happen?

22 MS. MEHTA: Yes. There's a few ways we can do
23 that, and they're already spelled out in your order.

24 First of all, there is a lawyer for the
25 company. Mr. Gross and Mr. Godkin currently represent
26 Six4Three. There's been no motion to withdraw that has

1 been granted. And, in fact, at the first hearing on
2 this whole mess, they asked Your Honor if they could be
3 permitted to withdraw. And Your Honor said, no, you're
4 staying in.

5 So they represent Six4Three, and they continue
6 to have to do that. We're not asking them to give legal
7 advice to Six4Three. We're asking them to supervise the
8 deletion of Facebook confidential --

9 THE COURT: As officers of the court?

10 MS. MEHTA: As officers of the court.

11 Supervised destruction, that's not legal
12 advice. It doesn't matter whether they think that they
13 have a conflict, which they haven't identified, and they
14 haven't made clear what it is. That is about
15 supervising the deletion of our information. They can
16 absolutely do that.

17 With respect to the logistics, Mr. Godkin's
18 law firm is based in Boston. That's a one-hour shuttle
19 flight from New York. Either Mr. Scaramellino or
20 Mr. Godkin or Mr. Kruzer can fly up there.

21 They had no trouble getting Facebook documents
22 all the way to London and all the way to Parliament.
23 They can figure out a way to get Mr. Godkin and
24 Mr. Scaramellino in a room together on the east coast
25 and Mr. Gross and Mr. Kramer in a room together on the
26 west coast, and they can do it in 48 hours.

1 They manufactured the whole leak over
2 Thanksgiving week in the UK. We're asking for two days.
3 You know, maybe it requires someone to work over the
4 weekend, but given the sensitivity of this and the
5 repeated disregard for the court orders, that needs to
6 happen. They were under an order to do it. And those
7 meetings should happen in a room immediately, one on the
8 west coast and one on the east coast.

9 THE COURT: For the -- Mr. Murphy? I'm sorry.

10 MR. MURPHY: Well, I was just going to say,
11 Your Honor, maybe the simple solution is just to have
12 the forensic examiner proceed with destruction. That
13 eliminates our concerns. It shouldn't present a problem
14 for Facebook. It shouldn't present a problem for
15 Mr. Russo's clients. That would seem to be the simple
16 solution because it takes the lawyers out of the
17 equation. It takes the lawyers from being potential
18 witnesses and potential defendants out of the equation.
19 And we are filing a motion to -- and we'll address that
20 later on -- to withdraw from the case.

21 MR. RUSSO: Your Honor, we would support what
22 Mr. Murphy is saying. We would like, with your
23 permission, Your Honor, to read your order because
24 counsel is reinterpreting what you wrote. You wrote:

25 (Reading) "No later than 48 hours after (i):

26 The forensic examiner notifies all parties and

1 counsel of record that the forensic examiner
2 has completed the preservation of evidence
3 from the Cloud storage accounts and physical
4 storage devices identified by Mr. Kramer and
5 returns access to any such accounts or device
6 to Mr. Kramer or service of notice of entry of
7 this order, whichever is later."

8 The forensic examiner on Saturday wrote:

9 "I have not completed and I interpret the
10 order as 48 hours from Monday should I say on
11 Monday that I've completed it."

12 I would love to know whether counsel for
13 Facebook, or any of the lawyers at Durie Tangri,
14 communicated with that forensic examiner about what it
15 should do this morning because the work was not done.
16 The work was not done. And we're not here to delay.
17 But we're here to say there's got to be a process that
18 complies with the order.

19 As things stand, your order was not going to
20 be performed by these lawyers because they're
21 withdrawing. They would not meet with Mr. Kramer or
22 Mr. Scaramellino. They also understood that the 48
23 hours would be after the notification; so there was no
24 contempt yet. But there was an assertion of contempt.
25 That is the conflict.

26 Mr. Lerner knows that. He's aware of what the

1 conflict is. They're driving the conflict here. They
2 need to start withdrawing some of these positions,
3 Your Honor. They can't have it both ways.

4 THE COURT: All right. Counsel, there's no
5 violation of my court order because I am going to make
6 some modifications.

7 The idea and the general theme is to destroy
8 the information that's being sought by Facebook given
9 the circumstances. Facebook has represented that
10 Mr. Scaramellino and Mr. Kramer cannot be trusted;
11 hence, the reason for the request and order thereon to
12 destroy the evidence, this confidential information,
13 subject to all the protective orders in their
14 possession. That is the object, and that should be
15 accomplished by this order, and this order should be
16 practical.

17 And as I reviewed the order, it is not a
18 device-by-device order. It's until the forensic
19 examiner has completed its work that is to take place.

20 I'm sorry?

21 MS. MEHTA: I'm sorry, Your Honor.

22 My concern, Your Honor, is -- and this is the
23 reason that the order says, returns access to any such
24 account or device. And then says that the certification
25 has to be for that device or account.

26 THE COURT: On which page and line number,

1 please?

2 MS. MEHTA: Yes, Your Honor. Page 2 of the
3 order.

4 First, with respect to Mr. Kramer, at
5 Line No. 18, it says, "And returns access to any such
6 accounts or device to Mr. Kramer."

7 And then at Line 21 through 22 of Page 2, it
8 says: "Shall certify to the court under penalty of
9 perjury under the laws of the State of California that
10 for that device, or account." So it's express -- and
11 the same language appears on Page No. 4 with respect to
12 Mr. Scaramellino. And that is precisely because, at
13 their insistence, the devices and the accounts were
14 returned on a rolling basis. And that is the problem.
15 Right now we have had two weeks go by where they
16 continue to have access to our information, and they
17 haven't deleted anything.

18 THE COURT: You know, I have said everything
19 but what is obvious that may be an appropriate solution
20 to the supervision, which is the personal attorneys
21 could do this in conjunction with their clients as this
22 is done. I don't see any reason why that would be a
23 problem.

24 MR. SULLIVAN: Your Honor, for Mr. Gross, we
25 would agree to that.

26 THE COURT: Mr. Murphy, Mr. Lassart?

1 MR. MURPHY: You would have me supervise the
2 destruction?

3 THE COURT: No.

4 MR. MURPHY: I am confused.

5 THE COURT: No. I would say that the personal
6 attorneys could be there to supervise this destruction,
7 and that would eliminate the representation problems.

8 If counsel -- all of you could be there when
9 this is done, quite frankly. That's a lot of legal
10 fees, but I don't think that -- that pales in comparison
11 to the problem that is before us. If personal counsel
12 were there, that, I think, would resolve the problem,
13 without the appointment of new counsel in the interim.

14 Now, that doesn't mean that there may be a
15 change of counsel later. That can be addressed by
16 virtue of motions later. But I think the immediacy of
17 the need for the destruction of the confidential
18 information gives rise to have personal counsel along
19 with your clients be present when this is destroyed.

20 MR. RUSSO: Your Honor, we've only been in
21 this case for less than ten days. I have no problem
22 trying to get cooperation, but trying to take multiple
23 flights to New York or Boston to do this
24 device-by-device approach that she continues to
25 suggest --

26 THE COURT: Well, no.

1 MR. RUSSO: -- is just not practical.

2 THE COURT: I don't think I made myself clear.

3 The way that this reads is once the work is
4 completed -- it doesn't say device by device. That
5 first paragraph, the first lines from Lines 1 through
6 12 -- or 1 through 14 talk about written notification
7 after the forensic examiner has completed its work. I
8 was looking at this order, thinking that the most
9 practical way of doing this is to do them all at once
10 after the forensic examiner is done.

11 Well, if there is a risk that there is further
12 violation, there shouldn't be because I've just issued
13 my order today that there be no violations of my order,
14 I want this to be as practical as possible and still
15 accomplish what Facebook is seeking, which is the
16 protection of their confidential information. And to
17 make that happen, we need to ensure that Mr.
18 Scaramellino and Mr. Kramer do not back up this
19 information on another device and distribute it, if
20 something happens to the case or they think it's
21 appropriate to do so --

22 MS. MEHTA: Your Honor --

23 THE COURT: -- or convenient to do so.

24 MS. MEHTA: One factual thing I wanted to just
25 alert you to. Everything has now been imaged and
26 preserved with the exception of one Drop Box account.

1 The forensic examiner provided notification of that this
2 morning. They've been given rolling notice. There was
3 December 8th. There was December 13th and then this
4 morning. Everything but one Drop Box account has now
5 been preserved.

6 Given the sensitivity and the fact that it's
7 now been ten days since the last order and
8 Mr. Scaramellino and Mr. Kramer continue to have access
9 to confidential information, we would request that you
10 clarify that within 48 hours of this morning, that
11 everything be deleted. Except that one Drop Box and
12 then that one Drop Box can be preserved, and we can work
13 out a way to delete that. That's the only thing
14 remaining. All of their hardware is ready to be given
15 back and deleted, their email, their Gmail, all of the
16 places where our information is at risk has now been
17 preserved and the deletion should take place
18 immediately.

19 MR. RUSSO: Your Honor, we could show you the
20 notification we were given. It looked like there was
21 more than one item. It looked like there would have to
22 be multiple, additional trips. We can show you what we
23 received this morning at 9:00 a.m.

24 Counsel is now interpreting that differently
25 than what we received. There's a listing of items that
26 hadn't been done.

1 THE COURT: No, no, no. Look, this is not a
2 jousting match. This is ridiculous. All I want is the
3 documents destroyed pursuant to my court order. That's
4 it. And what I do want is a practical way of doing it.
5 Okay? That's all we need to do. It's not a he said or
6 she said. It's not -- there shouldn't be very much
7 discussion about it.

8 Yes?

9 MR. RUSSO: I agree, Your Honor. And, to me,
10 maybe the simplest way to do this would have been to get
11 the forensic examiner to bring everything here. They
12 declined that.

13 There might be some smart way to deal with
14 this that doesn't result in other problems. For
15 example, they're asking for certain information to be
16 produced. That information may well be deleted as a
17 result of this deletion order. They're asking for
18 various items that these individuals are supposed to
19 search for and find.

20 Now, maybe their existing lawyers have those
21 items. I don't know. They're apparently asking for
22 anything that represents a communication with the press.
23 Maybe the lawyers have that information. I don't know.
24 But if stuff is deleted -- so, for example, if you look
25 at the dates that they suggested, they want things that
26 go back perhaps a couple of years. Really, even back

1 to, like, 2017, 2016, perhaps, because they represented
2 they started producing documents in 2016. That is two
3 years' worth of information. The stuff that they want
4 produced may be deleted. So there's really even
5 practical problems there. So if, at the end of the day,
6 the goal is to delete, we should have a timeframe for
7 deletion. We should have perhaps a list of search terms
8 that can bring up items to be deleted, and then maybe
9 it's Bates numbers that will be the way. Find the
10 document that has a Bates number and delete everything
11 between this range and that range. I don't know. I.

12 Am all in favor of getting a third party to do
13 it because then we don't have the lawyer-witness problem
14 here, which it looks like will be a real problem,
15 whoever is the lawyer. Albeit, the lawyers could still
16 say, go forward with the deletion. Which we have said.
17 It's just let's do it in a practical way.

18 MS. MEHTA: Your Honor, again, what we're
19 hearing again is delay. So Your Honor's suggestion that
20 Mr. Russo, who represents Mr. Kramer and
21 Mr. Scaramellino and doesn't have any purported conflict
22 or issues whatsoever, he can supervise the deletion. It
23 can be done in two days. Everything but one Drop Box
24 account has already been preserved. And with respect to
25 production of information, that is another separate
26 item. Of course we're going to want information

1 produced, but that's why we preserved it. It doesn't
2 mean that Mr. Scaramellino and Mr. Kramer should
3 continue to have access to it.

4 THE COURT: What I am going to do -- I think
5 given all of the volume of discussion that we've had,
6 and the rapidity of that discussion, we need to give a
7 break to our court reporter. So we're going to take
8 about a 20-minute break, and then we'll resume the
9 discussion of the implementation of the order. And then
10 we'll go off the record with regard to the ex parte
11 request that has been made within last three or four
12 days.

13 Court is in recess until 11:10.

14 (Recess taken.)

15 THE COURT: All right. We are back on the
16 record. And the record shall reflect that all counsel
17 are present at the counsel table or in the jury box.

18 We were discussing the issue of purging or
19 destroying confidential information protected by the
20 sealing order and the protective order relating to
21 Facebook.

22 So without more, I am going to issue the
23 following order:

24 The destruction of the Facebook confidential
25 information shall be at the Murphy Pearson law firm --
26 law offices in San Francisco beginning Wednesday,

1 December 19th, 2018, at nine o'clock a.m. and will
2 continue until completed.

3 Mr. Scaramellino and Mr. Kramer shall be
4 present.

5 The forensic examiner shall be present.

6 And there shall be a checklist of devices and
7 accounts prepared.

8 And the forensic examiner and Mr. Scaramellino
9 and Mr. Kramer shall go device by device and account by
10 account to delete Facebook's confidential documents as
11 defined in this court's order issued on
12 December 14th, 2018.

13 Counsel shall be present for the destruction,
14 and those counsel are as follows:

15 David Godkin, and his personal counsel;
16 Stuart gross and his personal counsel; Jack Russo,
17 personal counsel for Mr. Scaramellino and Mr. Kramer;
18 and counsel for Facebook.

19 Now, Mr. Scaramellino and Mr. Kramer's
20 certifications shall be ready for execution on
21 December 19th. The lists of accounts and devices shall
22 be appended as exhibits to the certifications,
23 respectively.

24 The parties concerned, Mr. Scaramellino and
25 Mr. Kramer, shall certify that they have destroyed or
26 deleted Facebook's confidential documents or those

1 documents as defined in the December 14th order from
2 each account and device enumerated by the forensic
3 examiner and from any other device and account under
4 their possession, custody, or control. In other words,
5 if it is accidentally backed up somewhere else, that
6 shall be deleted as well.

7 The court believes it is incumbent upon its
8 powers to articulate that the purpose of the
9 December 14th order and this order is that
10 Mr. Scaramellino and Mr. Kramer shall not have any of
11 Facebook's confidential documents in their possession,
12 custody, or control.

13 I am going to repeat that.

14 The court believes it is essential to state
15 and proclaim that the purpose of the December 14th order
16 and this order is that Mr. Scaramellino and Mr. Kramer
17 shall not have any of Facebook's confidential documents
18 in their possession, custody, or control. Any
19 violations of these orders shall subject the violators
20 to sanctions and/or contempt.

21 I think earlier during the course of the
22 discussions by counsel, the issue of search terms and so
23 forth came into being, and those search terms are
24 irrelevant because I have suspended or vacated the
25 discovery order.

26 So there shouldn't be any more discussions

1 about search terms with regard to those confidential
2 records and the information that was collected,
3 accordingly.

4 So what we're going to do is have Facebook
5 prepare this order.

6 Is it pretty clear?

7 MS. MEHTA: Your Honor, I just have one
8 clarification. Mr. Scaramellino's devices are in
9 New York.

10 THE COURT: Yes.

11 MS. MEHTA: There was an objection from
12 Mr. Russo to any of those materials being moved from
13 New York to California, and I just wanted to confirm --

14 THE COURT: The objection is overruled.

15 MS. MEHTA: Right.

16 MR. RUSSO: That's fine, Your Honor. It
17 wasn't an objection. It was simply a statement that
18 they were in New York and perhaps this could be done in
19 New York.

20 THE COURT: This is going to be done at the
21 Murphy Pearson firm in San Francisco.

22 MR. RUSSO: Understood.

23 THE COURT: It is so ordered. Thank you,
24 Mr. Russo.

25 MR. RUSSO: May I?

26 THE COURT: Yes.

1 MR. RUSSO: I do pro bono pro temming for the
2 San Clara Superior Court on Wednesdays. I don't know if
3 I can get that reshuffled. Perhaps if I can't, you can
4 allow Mr. Sargent, my partner, to do this work with
5 Mr. Scaramellino and Mr. Kramer. He did the previous
6 work with the forensic examiner last time around.

7 THE COURT: I understand. And I'll leave you
8 to your own discretion or abilities as to whether you
9 can extricate yourself from that responsibility for
10 Wednesday or otherwise have your partner be there for
11 this process.

12 MR. RUSSO: Thank you.

13 THE COURT: Thank you.

14 MR. MURPHY: Your Honor, just briefly, my
15 client apparently has depositions scheduled for the end
16 of this week. Is it possible just for my office to
17 oversee this process? He's back in Boston, obviously,
18 and --

19 THE COURT: No. Those depositions are going
20 to have to be continued.

21 MR. MURPHY: Okay. Thank you, Your Honor.

22 THE COURT: Thank you, Mr. Murphy. And I
23 don't mean to be a contrarian, but I believe that
24 circumstances have dictated the necessity for the
25 presence of your client.

26 And with that, I ask for Facebook to prepare

1 this order.

2 MS. MEHTA: Yes, Your Honor.

3 THE COURT: Is everything clear? Or do I need
4 to restate anything?

5 MR. LERNER: It is clear.

6 If I could be heard to clarify, if I can, or
7 perhaps just clear up my own confusion on the discovery
8 point. I would love minute --

9 THE COURT: There's no discovery. It's done.
10 I don't want to talk about discovery anymore because I
11 have vacated my discovery order. The information
12 collected thereby is frozen and shall be not accessible
13 by any party until further court order.

14 MR. LERNER: Understood.

15 THE COURT: Yes.

16 MR. LERNER: And I think it's no doubt
17 probably on me that I had brought up earlier, for
18 example, the waiver and those things. And the reason I
19 brought that up is that we had asked, based on the
20 ruling at the last hearing, that the parties should, or
21 could, seek expedited briefing, as various people have
22 on issues. We asked for expedited briefing on this
23 question about privilege.

24 And so what I wanted to clarify, as I
25 understand that right now Your Honor is saying, the
26 previous issues that we discussed with respect to search

1 terms or looking at what was collected is no longer on
2 the table. But what I wanted clarity on is we,
3 obviously, were planning to and would like to file that
4 motion as a matter of sequence precisely so that we can
5 get this information, including the non-privileged
6 information that Your Honor said, obviously, we should
7 have. Nobody is saying, for example, that Mr. Godkin's
8 emails with third parties are remotely privileged, that
9 we should get those things so that we can file the
10 briefs that are being contemplated. And so what I just
11 want to clarify is we've sought the ability to file
12 those motions expeditiously. And it wasn't clear to me
13 if what you meant is there will never be any discovery
14 on this, in which case, I would definitely like to be
15 heard, or it was, no, file the motions as I told you,
16 and we tried to make clear that is what we were
17 requesting.

18 THE COURT: It's the latter. File your
19 motions. At this juncture, the discovery is not
20 necessary. If you believe -- and I think all the
21 parties had concurred, which I said at the outset, that
22 there is sufficient information out there already to
23 file your motions.

24 MR. LERNER: Understood. And I agree that
25 there is certainly sufficient information. I think the
26 issue for us has been, and will continue to be, to

1 understand the scope of this; and, hence, the request
2 for the briefing on the privilege.

3 The other issue we have, of course, is that
4 even though nobody could make, under any law that I'm
5 aware of, an argument that we should not already have
6 the communications between the lawyers and third
7 parties, because they cannot be privileged, and it
8 doesn't need to go through counsel or anybody else.
9 Mr. Godkin and Mr. Gross, as counsel in this case, could
10 just give us those documents, but we still don't have
11 them.

12 And so that is why I am focused on this
13 question is we're trying to uncover the scope to file
14 the briefs contemplated, and we don't even have the
15 stuff that nobody can possibly argue is not privileged.

16 THE COURT: Any comments by counsel?

17 MR. MURPHY: Well, without having seen the
18 documents, I can't say they are privileged or not
19 privileged. I think the court earlier said, go through
20 the proper procedures for whatever you're going to do.
21 They should follow the proper procedures.

22 That's all we would comment on.

23 MR. LERNER: In speaking with Mr. Godkin, they
24 have said, because nobody can argue, just for the sake
25 of clarity, that an email to the committee, or to a
26 reporter, is privileged. Counsel cannot argue that he

1 would need to review those. There's no universe in
2 which, unless Mr. Godkin was also representing CNN, he's
3 going to claim privilege.

4 Those are the documents we asked for. And
5 here, however many weeks later, even those we still
6 haven't seen.

7 MR. MURPHY: Your Honor, I think we should go
8 step by step. The first step is complying with the
9 court's order, and then we can do whatever is necessary
10 in order to move this litigation forward.

11 But, from my client's standpoint, we're going
12 to be seeking, and you alluded to the fact that we have
13 sought ex parte relief for an order shortening time to
14 file a motion to withdraw as counsel. I think we can go
15 step by step. There's no immediate need to undertake
16 this discovery.

17 THE COURT: Okay. We're going to go off the
18 record with regard to the ex parte in a moment, but
19 we're still on the record as to this issue.

20 The question is whether or not the counsel
21 would voluntarily disclose non-confidential and
22 non-privileged communications with the news media, which
23 is what counsel for Facebook is asking for. So you may
24 want to think about that for a moment.

25 And we're going to go off the record with
26 regard to the ex parte request. We can go back on later

1 with respect to the other issue.

2 MR. LERNER: Thank you for hearing me on that,
3 Your Honor.

4 THE COURT: You're welcome. Thank you.

5 All right. We're off the record.

6 (Discussion off the record.)

7 THE COURT: Counsel and the court had
8 discussed the issue of the non-confidential
9 communications between Mr. Godkin's firm and the press
10 that would not be protected by the
11 attorney -- attorney-client privilege.

12 So the court has asked whether Mr. Godkin
13 would voluntarily produce those communications, "those
14 communications" defined as the communications between
15 the firm and the press, to Facebook and Mr. Pearson --

16 MR. MURPHY: Murphy.

17 THE COURT: I'm sorry. Mr. Murphy.
18 I'm sorry.

19 MR. MURPHY: That's all right.

20 THE COURT: Mr. Murphy, you have agreed?

21 MR. MURPHY: I have, Your Honor. No one would
22 confuse me with Ron Pearson except for Your Honor.

23 THE COURT: Those are names -- no. I wouldn't
24 do that. I wouldn't call you Mr. Lassart, either.

25 MR. MURPHY: We know there's a difference
26 there.

1 THE COURT: Yes, yes.

2 So, Mr. Murphy, I understand that you have
3 agreed to that.

4 So is there a stipulation that your client
5 will produce communications between the press and the
6 government, being the DCMS Parliament, that kind of
7 thing, by January 7th, 2019?

8 MR. MURPHY: Non-privileged documents,
9 yes, Your Honor, so stipulated.

10 THE COURT: Right. So stipulated?

11 MR. SULLIVAN: Thank you, Your Honor. I did
12 have a request for clarification. Ms. Mehta recommended
13 or she referred to various media, and she listed some.
14 But I was wondering, to expedite it, if she could tell
15 us which ones.

16 THE COURT: I think all media. I think they
17 were also included in the sealing order. But there's
18 the -- all media, whoever they are, anyone from the
19 *Wall Street Journal* to the *New York Times*,
20 *Washington Post*, CNN, any of the other major media,
21 *The Guardian*, anyone with regard to the media and, in
22 addition to that, the government, meaning the UK
23 government, the DCMS, or members of Parliament -- and
24 members of Parliament, or anyone associated with the UK
25 government's House of Commons. I don't know if the
26 House of Lords would be interested in something like

1 this, but certainly the House of Commons that have been
2 involved in this.

3 So if there is a stipulation, it will be so
4 ordered. That information, meaning the non-confidential
5 communications by Mr. Godkin's firm and the government
6 and the press, shall be disclosed to Facebook no later
7 than January 7th, 2019, by close of business.

8 MR. LERNER: There were just two small
9 details, and I do not envy Your Honor keeping all of
10 these things in mind on the fly while you're doing this.
11 And so I just want to make sure I got it. So I think
12 it's Mr. Gross and Mr. Godkin?

13 THE COURT: It should be. And that was my
14 next -- I was thinking about that as I was saying it.
15 It's Mr. Gross and Mr. Godkin. Mr. Gross and
16 Mr. Godkin.

17 Does that make sense to everyone?

18 MR. LERNER: Right. And then the only other
19 clarification was the communications with the
20 governmental entities, as Your Honor knows have
21 included, for example, the Cal AG and other government
22 entities. To your point about the media, we obviously
23 don't know which ones; so we would just request that it
24 be government entities, US or UK.

25 THE COURT: We're extending the net, aren't
26 we?

1 MR. LERNER: Only to the folks that we
2 know -- I mean, the Cal AG was obviously the entity we
3 talked about where it looked like they were sending the
4 Bates numbers to these documents to the government.

5 THE COURT: I understand. You have a basis
6 for that.

7 So I would include governmental entities,
8 including the California Attorney General's Office,
9 et cetera. Okay?

10 MR. LERNER: Thank you.

11 THE COURT: That will be the order of the
12 Court.

13 Yes?

14 MR. SULLIVAN: Sure. Your comments are just
15 related to Facebook, right, not every time my client has
16 talked to the media? I just want to make sure it's
17 narrowly tailored to what this case is about.

18 THE COURT: Well, I don't know that your
19 client has spoken with the media or not. But -- I don't
20 understand your concern.

21 MR. SULLIVAN: We're just worried that -- he's
22 not going to produce every single piece of
23 correspondence that he's ever had with the media related
24 to other cases?

25 THE COURT: No. It's just related to
26 Facebook. You're exactly right. It's just related to

1 the Facebook case, to Facebook. Okay?

2 MR. SULLIVAN: Yes.

3 THE COURT: And I order the Durie Tangri firm
4 to prepare the order.

5 MR. LERNER: The last issue for us,
6 Your Honor, that I think we were going to take back up
7 on the record was our motion on the privilege. And if
8 it's acceptable to the court, we would work from the
9 same date that was scheduled for the motion to withdraw
10 since we're going to be talking about related issues
11 anyways. We could use the same date, if that's
12 efficient.

13 THE COURT: Provided that you have your papers
14 prepared, I can't stop you from doing that. That is a
15 date that may be suitable. I don't know.

16 There are a lot of things that are in the
17 pipeline, and the 7th may or may not be a good day,
18 because the afternoon is going to be taken by something
19 else.

20 MR. MURPHY: Your Honor, because of
21 privilege -- and I don't mean to interrupt the court's
22 thought process.

23 THE COURT: Yes?

24 MR. MURPHY: Because of privilege issues, I
25 would suggest that until there has been a determination
26 on a motion to withdraw, that we should defer these

1 issues of the attorney-client privilege. And, frankly,
2 I don't know if the issue has even been teed up in terms
3 of the discovery that has been not allowed.

4 So what are they proposing -- well, I don't
5 want to get into that.

6 THE COURT: Well, as you know, there's -- I
7 believe I said at the outset that there is a two-step
8 process to determine whether or not privilege is
9 overcome, and that would be the crime fraud exception
10 pursuant to Evidence Code Section 956.

11 And as you correctly stated, Mr. Murphy, we're
12 not there yet. That hasn't even been teed up. It's
13 been mentioned. There's nothing pending.

14 I am trying to control this litigation and
15 managing it such that it can be dealt with efficiently
16 is my concern. And it should come no earlier than
17 February 7th, maybe later. And it would be a matter of
18 checking with the courtroom clerk, if that date is
19 available.

20 As we look at February 7th, I can't think a
21 motion to withdraw would take that long. So perhaps we
22 could entertain it on that date. I just don't know.

23 Mr. Lassart?

24 MR. LASSART: Your Honor, the difficulty is
25 that it's going to implicate a defense, if there is a
26 privilege, of the corporation. And we have pending a

1 motion to withdraw, which makes it unable to create the
2 defense for the client because we're conflicted. So
3 that is the difficulty.

4 So the withdrawal, which is a motion only
5 between the client and the lawyer and the court, and the
6 other side doesn't get to pick their lawyer, I think
7 that should be handled first, and then there can be a
8 determination of who can defend the corporation on the
9 motion -- on the attorney-client privilege issue.

10 MR. LERNER: And I think we take Your Honor's
11 point that there's a lot going on. Obviously, if it
12 can't be heard that day, it can't be. But we also agree
13 with Your Honor that usually motions to withdraw don't
14 take that long.

15 As to the point about counsel, in addition to
16 the ability to have seven lawyers, or however many
17 people it is, involved in this already, what you haven't
18 heard is that Six4Three has counsel right now litigating
19 the appeals, among other things, that are not here
20 suggesting this.

21 So there are lawyers that can handle this,
22 even if the gentlemen here are saying they have to
23 withdraw. Six4Three has other lawyers in this case
24 litigating.

25 THE COURT: Which leads me to something I
26 didn't ask earlier, are Mr. Godkin and Mr. Gross

1 involved in the appeal? Are they representing Six4Three
2 on the appeal that's pending in the First District?

3 MR. MURPHY: My understanding, Your Honor, is
4 that Six4Three has counsel.

5 THE COURT: Appellate counsel?

6 MR. MURPHY: Yes.

7 THE COURT: Okay. So Mr. Godkin, Mr. Gross
8 are not involved in the appeal?

9 MR. MURPHY: That's correct.

10 THE COURT: Okay.

11 MR. MURPHY: Well, not involved in the appeal
12 as appellate counsel, but, obviously, by providing
13 information to the appellate counsel. So there's an
14 involvement, but they're not representing --

15 THE COURT: They're not representing them as
16 appellate counsel?

17 MR. MURPHY: Right.

18 THE COURT: Okay.

19 MR. LERNER: So there's, in other words,
20 another set of lawyers who are not claiming a conflict
21 representing Six4Three right now. And I don't think it
22 makes a whole lot of sense for folks to be saying we
23 can't possibly address any motions just because one set
24 of Six4Three's lawyers are saying, we're leaving. It
25 doesn't mean all of their lawyers are. To the contrary,
26 as I said, they're busy litigating issues as we speak.

1 THE COURT: I am not willing to go any further
2 with this today. It's not ripe. If you need to file a
3 motion, file your motion, and we'll try to accommodate
4 it on the 7th, if that's what you want to do.

5 MR. RUSSO: Your Honor, there's a solo
6 appellate specialist, single lawyer, who I understand is
7 handling the pending appeals.

8 THE COURT: I see.

9 MR. RUSSO: One person, not a firm, not a
10 group of lawyers, a solo appellate specialist, who is
11 handling it. I think her name is Ms. Erlind [ph].
12 Facebook would know. There is a solo lawyer that is
13 handling the appeal and the cross-appeal.

14 THE COURT: For Six4Three?

15 MR. RUSSO: That's right.

16 THE COURT: All right. Very well. Facebook
17 is to prepare the orders with regard to the proceedings
18 today.

19 Thank you very much, everyone. We'll see you
20 in January.

21 Court is in recess.

22 (Proceedings adjourned.)

23 --oOo--

24

25

26

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN MATEO)

I, Megan Zalmal, Certified Shorthand
Reporter No. 10925, do hereby certify:

That on December 17, 2018, in the County of
San Mateo, State of California, I took in stenotype a
true and correct report of the oral proceedings had in
the case of Six4Three versus Facebook, CIV533328, and
that the foregoing pages, 1-62, are a true and accurate
transcription of my stenotype notes, taken as aforesaid,
and is a whole transcription thereof.

DATED: Redwood City, California, December 23, 2018.



MEGAN ZALMAI, CSR NO. 10925

EXHIBIT 4

1 IN THE SUPERIOR COURTS OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN MATEO

3 ---000---

4
5 SIX4THREE, LLC,

CERTIFIED TRANSCRIPT

6 PLAINTIFFS,

7 VS.

CASE NO. CIV533328

8 FACEBOOK, INC., ET AL.,

9 DEFENDANTS.

10 _____/

11
12 REPORTER'S TRANSCRIPT OF PROCEEDINGS (PAGE 7 - 11 SEALED)

13 BEFORE: HONORABLE V. RAYMOND SWOPE, JUDGE

14 DEPARTMENT 23

15 MARCH 13, 2019

16 A P P E A R A N C E S

17 FOR THE PLAINTIFFS:

18 STUART G. GROSS DAVID S. GODKIN
ATTORNEY AT LAW ATTORNEY AT LAW

19 JAMES A. MURPHY JAMES A. LASSART
ATTORNEY AT LAW ATTORNEY AT LAW

20 FOR THE DEFENDANTS:

21 JOSH H. LERNER LAURA E. MILLER CATHERINE Y. KIM
ATTORNEY AT LAW ATTORNEY AT LAW ATTORNEY AT LAW

22 SONAL N. MEHTA NATALIE NAGLE ZACHARY ABRAHMSON
23 ATTORNEY AT LAW ATTORNEY AT LAW ATTORNEY AT LAW

24 FOR THE PRINCIPAL PARTY:

25 JACK RUSSO
ATTORNEY AT LAW

26 REPORTED BY: GERALDINE VANDEVELD, C.S.R. 8634

P R O C E E D I N G S

REDWOOD CITY, CALIFORNIA

MARCH 13, 2019

--000--

THE COURT: GOOD MORNING, EVERYONE. CALLING CASE CIV5333238. THE MATTER OF SIX4THREE VERSUS FACEBOOK, ET AL. WILL COUNSEL, PLEASE, STATE THEIR APPEARANCES FOR THE RECORD.

MR. MURPHY: GOOD MORNING, YOUR HONOR. JAMES MURPHY APPEARING ON BEHALF OF BIRNBAUM AND GODKIN AND PRESENT ALSO IS DAVID GODKIN.

MR. LASSART: JAMES LASSART ALSO APPEARING ON BEHALF OF DAVID GODKIN.

MR. SULLIVAN: DON SULLIVAN FOR STUART GROSS AND GROSS AND KLEIN AND MR. GROSS IS HERE.

MR. RUSSO: JACK RUSSO FOR THE INDIVIDUALS TED KRAMER AND MR. SCARAMELLINO. THEY'RE BOTH HERE.

MS. MEHTA: GOOD MORNING. SONAL MEHTA, JOSH LERNER, LAURA MILLER, CATHERINE KIM AND ZACHARY ABRAHMSON HERE FOR FACEBOOK AND FROM FACEBOOK IS NATALIE NAGLE.

THE COURT: GOOD MORNING. THIS MATTER IS A MOTION TO WITHDRAW AS COUNSEL OF RECORD THAT HAS BEEN FILED BY MR. GODKIN AND HIS FIRM BIRNBAUM AND GODKIN. AND MR. GROSS ON BEHALF OF HIS FIRM. THE COURT HAD SOME QUESTIONS WITH REGARD TO THE NATURE OF THE MOTION AND WANTS TO CONDUCT AN IN CAMERA

1 REVIEW OR HEARING WITH REGARD TO THE CONFLICT. HENCE THE
2 REASON THAT I'M GOING TO BE MEETING IN CHAMBERS WITH THE
3 PARTIES THAT WERE SUBJECT TO THE CONFLICT WHICH MEANS THAT THE
4 CONFIDENTIAL RELATIONSHIP BETWEEN MR. GODKIN'S FIRM AND
5 MR. KRAMER AND MR. GROSS'S FIRM AND MR. KRAMER ARE THE ONLY
6 ISSUES THAT WE'LL BE DISCUSSING IN CHAMBERS. AND TO THAT END,
7 I ASK ONLY THAT MR. GODKIN, MR. GROSS, MR. KRAMER AND
8 MR. SCARAMELLINO BE PRESENT WHILE WE ARE DISCUSSING THESE
9 MATTERS.

10 NO QUESTIONS ARE GOING TO BE ASKED WITH REGARD TO
11 INCRIMINATING MATTERS THAT IS THAT WILL TRIGGER A FIFTH
12 AMENDMENT QUESTION WITH REGARD TO THE PARTIES. SO REST
13 ASSURED THAT THAT'S NOT GOING TO HAPPEN. ALL RIGHT.

14 AND, FURTHER, AFTER THE PROCEEDINGS IN CAMERA, THOSE
15 PROCEEDINGS WILL BE SEALED. SO I'M ORDERING THAT THE
16 TRANSCRIPT CONCERNING THE CONDUCT OF THE IN CAMERA REVIEW AND
17 DISCUSSIONS WILL BE SEALED AND NOT ACCESSED TO ANYONE. AND
18 THIS IS JUST PARTICULAR TO THE MOTION TO WITHDRAW AND NOTHING
19 ELSE, SO IT WILL HAVE NO RELEVANCE TO ANY OTHER SUBSEQUENT
20 HEARINGS. DOES EVERYONE UNDERSTAND THAT? DOES ANYONE HAVE
21 ANY DISAGREEMENT WITH THE COURT'S PRONOUNCEMENT?

22 MR. RUSSO: YOUR HONOR, I WOULD ASK TO BE PRESENT AT
23 THAT HEARING TO MAKE SURE MR. SCARAMELLINO AND MR. KRAMER ARE
24 REPRESENTED. I DON'T EXPECT TO ARGUE. I JUST EXPECT TO
25 LISTEN BECAUSE THEY HAVE ASKED ME TO BE HERE TODAY TO DEAL
26 WITH THIS WITHDRAWAL ISSUE, IF YOU HAVE QUESTIONS. AND YOU

1 MAY HAVE QUESTIONS. YOU MAY HAVE QUESTIONS I CAN ANSWER,
2 WHICH I WILL. OTHERWISE I WOULD LIKE TO OBSERVE IN CHAMBERS
3 WITH YOUR PERMISSION.

4 THE COURT: ALL RIGHT.

5 MS. MEHTA: YOUR HONOR, WE HAVE NO PROBLEM WITH YOU
6 OF COURSE CONDUCTING AN IN CAMERA REVIEW. WE DO HAVE AN
7 OBJECTION TO PERSONAL COUNSEL FOR MR. KRAMER AND
8 MR. SCARAMELLINO BEING THERE. THIS IS A MATTER BETWEEN THE
9 LAWYERS AND SIX4THREE ENTITY FOR WHICH THEY ARE THE
10 REPRESENTATIVES, BUT THEIR INDIVIDUAL COUNSEL NEED NOT BE
11 THERE. AND THAT RAISES A WHOLE SET OF COLLATERAL ISSUES.

12 THE COURT: I THINK I SAID AT THE OUTSET THAT IT'S
13 IMPORTANT TO UNDERSTAND THE RELATIONSHIP BETWEEN COUNSEL AND
14 THE CLIENTS. AND, AGAIN, TO HAVE A PURE HEARING WITHOUT ANY
15 INTERFERENCE OR COACHING OR ANYTHING ELSE, I'VE GOT TO ASK
16 CERTAIN QUESTIONS.

17 IT'S GOING TO BE SEALED, MR. RUSSO. AND I
18 UNDERSTAND THAT YOU'RE ACTING ON BEHALF OF YOUR CLIENTS. BUT
19 THE CONTENT OF THE QUESTIONS AND THE RESPONSES THAT I GET WILL
20 BE PRECEDING DECEMBER 1ST OR CERTAINLY WHEN PERSONAL COUNSEL
21 WERE CALLED IN TO REPRESENT THE RESPECTIVE PARTIES. THE
22 PARTIES' COUNSEL HAVE ONLY INTERVENED RECENTLY OR BEEN
23 REPRESENTING THE PARTIES WITHIN THE LAST THREE MONTHS OR SO.

24 MR. RUSSO: OUR REPRESENTATION STARTED IN NOVEMBER,
25 YOUR HONOR.

26 THE COURT: NOVEMBER WHEN?

1 MR. RUSSO: IT WAS -- I'M SORRY. DECEMBER. YOU'RE
2 CORRECT. IT WAS DECEMBER. IT WAS LIKE DECEMBER 1ST AFTER OR
3 MAYBE EVEN -- AFTER DECEMBER 7. EXCUSE ME.

4 THE COURT: RIGHT. I REMEMBER WHEN YOU CAME TO
5 REPRESENT YOUR CLIENTS. BUT WHAT I WANT IS A PRISTINE,
6 UNADULTERATED, UNCOACHED EXAMINATION. YES.

7 MR. MURPHY: JUST A POINT OF CLARIFICATION. THAT
8 WOULD INCLUDE MR. LASSART AND MYSELF?

9 THE COURT: YES. THAT WAS MY INTENT.

10 MR. LERNER: ONE LAST QUESTION, YOUR HONOR. YOU
11 IDENTIFIED THE QUESTION WE HAD WHICH IS IF SOMEONE WERE TO
12 ASSERT THEIR RIGHTS OR PRIVILEGES THAT WOULD PRECLUDE
13 ANSWERING YOUR QUESTIONS, WE UNDERSTAND THAT YOU ARE SEALING
14 IT AND ANYTHING ELSE. BUT WE WOULD, I BELIEVE, AND I WOULD
15 HOPE YOU AGREE BE ENTITLED TO KNOW THAT EVEN IF IT COULDN'T BE
16 NECESSARILY USED IN SOME WAYS LATER, IT WOULD BE RELEVANT TO
17 US THAT SOMEONE HAD REFUSED TO ANSWER YOUR QUESTIONS BECAUSE
18 THAT WOULD PERTAIN TO OUR ABILITY OBVIOUSLY TO BRING OUR SIDE
19 OF THE ARGUMENT. THAT'S OUR ONLY REQUEST.

20 THE COURT: I THINK THE ATTORNEY/CLIENT PRIVILEGE
21 RAISING THE PRIVILEGE ISSUE IS NOT CONFIDENTIAL IN ITSELF, BUT
22 THE REASONS BEHIND IT CERTAINLY WILL BE. ALL RIGHT. OKAY.
23 SO WHAT WE'RE GOING TO DO IS TAKE A FEW MINUTES TO SET UP IN
24 MY CHAMBERS. I WILL BE ASKING A SERIES OF QUESTIONS THAT
25 WON'T TAKE TOO TERRIBLY LONG. AND THEN I WILL -- DEPENDING
26 UPON HOW THE QUESTIONS ARE ASKED, I WILL LIKELY TAKE IT UNDER

1 SUBMISSION. OKAY. THAT WILL CHANGE, OF COURSE, IF THERE'S A
2 RAISE OF PRIVILEGE. BUT I DON'T KNOW THAT.

3 ALL RIGHT. SO THE COURT IS IN RECESS. WE ARE GOING
4 TO RETIRE TO MY CHAMBERS FOR THE EXAMINATION. AND MR. GODKIN
5 AND MR. GROSS, MR. SCARAMELLINO AS A MEMBER OF THE LEGAL TEAM
6 AND MR. KRAMER SHALL BE IN MY CHAMBERS. WE WILL CALL YOU BACK
7 AS SOON AS OUR COURT REPORTER GETS SET UP. OKAY. THANK YOU.

8 (WHEREUPON, A RECESS WAS TAKEN.)

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26 (PAGES 7 THROUGH 11 COURT ORDERED SEALED.)

1 THE COURT: ALL RIGHT. WE ARE BACK ON THE RECORD.
2 AND WE HAD PREVIOUSLY TERMINATED THE IN CAMERA REVIEW. THE
3 ATTORNEY/CLIENT PRIVILEGE WAS RAISED BY THE PRINCIPAL FOR
4 SIX4THREE. THEREFORE, THE INQUIRY WILL BE CONCLUDED. I HAVE
5 A COPY OF THE RETAINER AGREEMENT THAT I'M GOING TO RETURN TO
6 MR. GROSS.

7 MR. GROSS: WOULD YOU LIKE ME TO APPROACH THE BENCH,
8 YOUR HONOR?

9 THE COURT: I WILL HAVE MY BAILIFF RETURN IT TO YOU.
10 AND I DID NOT REVIEW IT BY THE WAY UNDER THE CIRCUMSTANCES.
11 VERY WELL. I DO HAVE A COUPLE QUESTIONS FOR MR. SCARAMELLINO.
12 AND I REMIND YOU THAT YOU REMAIN UNDER OATH.

13 Q. MR. SCARAMELLINO, ARE YOU CURRENTLY A LICENSED
14 ATTORNEY?

15 A. NO, YOUR HONOR.

16 Q. SO YOU'RE NOT LICENSED IN NEW YORK OR NEW JERSEY OR
17 IN CALIFORNIA, CORRECT?

18 A. THAT IS CORRECT, YOUR HONOR.

19 Q. OKAY. SO YOU WERE NEVER LICENSED IN ANY STATE AT
20 ANY POINT IN 2018; IS THAT CORRECT?

21 A. THAT IS CORRECT, YOUR HONOR.

22 Q. WERE YOU LICENSED ON MAY 15, 2018?

23 A. NO, YOUR HONOR.

24 THE COURT: VERY WELL. THANK YOU. GIVEN THE
25 NOVEMBER 30TH, 2018, HEARING AND THE RELATED DECLARATION WHERE
26 MR. GODKIN DISCUSSED THE NATURE OF THE CONFLICT OR THAT A

1 CONFLICT HAD ARISEN AND GIVEN THE VARIOUS EMAILS ATTACHED TO
2 MS. KIM'S DECLARATION IN OPPOSITION TO THE MOTIONS TO WITHDRAW
3 AND GIVEN THE DECLARATIONS FILED BY MR. GODKIN AND MR. KRAMER,
4 I FIND THAT THERE IS NO CONFLICT WITHOUT FURTHER EVIDENCE.
5 THEREFORE, THE MOTIONS TO WITHDRAW ARE DENIED WITHOUT
6 PREJUDICE.

7 WE WILL PROCEED WITH THE HEARINGS ON FRIDAY,
8 MARCH 15TH. AND THE HEARINGS WILL BE ON THE FOLLOWING
9 MATTERS. FACEBOOK'S MOTION TO SEAL PORTIONS OF THEIR
10 OPPOSITION TO THE MOTIONS TO WITHDRAW. THE ANTI-SLAPP
11 ATTORNEY'S FEES MOTIONS BY EACH OF THE PARTIES AND FACEBOOK'S
12 MOTION TO OPEN DISCOVERY. AS WELL AS THE CASE MANAGEMENT
13 CONFERENCE. THOSE MATTERS WILL PROCEED ON FRIDAY AS
14 SCHEDULED.

15 IN ADDITION, WE'RE GOING TO NEED A NOTICE OF ERRATA
16 SHEET FROM MR. GODKIN WITH REGARD TO MR. GODKIN'S DECLARATION.
17 THERE WERE NO EXHIBITS THAT WERE FILED OR LODGED WITH THE
18 COURT WITH RESPECT TO YOUR DECLARATION IN RELATION TO FRIDAY'S
19 PROCEEDINGS. ALL WE HAVE IS THE BARE DECLARATION WITHOUT THE
20 ATTACHMENTS, SO THEY SHALL BE FILED AND ELECTRONICALLY SERVED
21 NO LATER THAN TODAY MARCH 13TH, 2019, SO THAT THE COURT HAS
22 THEM TOMORROW MORNING.

23 DOES ANYONE SEEK ANY FURTHER CLARIFICATION AS TO
24 THAT ORDER? ANYTHING FURTHER?

25 MR. LERNER: YES, YOUR HONOR.

26 THE COURT: YES. MR. MURPHY.

1 MR. MURPHY: BRIEFLY, YOUR HONOR.

2 THE COURT: YES.

3 MR. MURPHY: I UNDERSTAND THAT THE COURT IS DECIDING
4 THE ISSUE ON THE MOTION TO BE RELIEVED AS COUNSEL ON THE BASIS
5 OF THE IN CAMERA IN PART, BUT I THINK THE COURT COULD ALSO
6 LOOK AT THE OPPOSITION TO THE MOTION TO BE RELIEVED AS COUNSEL
7 TO SEE WHERE THE CONFLICT LIES.

8 FACEBOOK HAS TAKEN THE POSITION THAT IT WILL BE
9 SEEKING DISCOVERY, POSSIBLE SANCTIONS AGAINST THE LAWYERS AND
10 AGAINST SIX4THREE FOR AMONG OTHER THINGS VIOLATING THE COURT
11 ORDER AS OF MARCH 18, 2018.

12 I DON'T THINK THERE'S ANY QUESTION BUT THAT
13 FACEBOOK HAVING RAISED THE CONFLICT, NOW CLAIMING THAT THERE
14 IS NO CONFLICT CANNOT HAVE IT BOTH WAYS. IT'S CLEAR FROM THE
15 ALLEGATIONS SET FORTH IN THEIR OPPOSITION THAT THERE IS AN
16 UNWAIVABLE CONFLICT THAT PREVENTS MY CLIENT AND PROBABLY
17 MR. GROSS AS WELL FROM ADVISING SIX4THREE WITH RESPECT TO ITS
18 RIGHTS.

19 FURTHERMORE, AND I CAN'T CITE TO THE NEW RULE OF
20 PROFESSIONAL RESPONSIBILITY. BUT UNDER 3310, CLEARLY THERE IS
21 A CONFLICT BETWEEN THE BEST INTEREST OF BIRNBAUM AND GODKIN
22 AND THE BEST INTEREST OF MR. GROSS'S FIRM AND THE SIX4THREE
23 PARTIES WHICH PREVENTS MY CLIENT FROM ADVISING SIX4THREE IN
24 ANY ASPECT.

25 SO THE CONFLICT HAS BEEN T'D UP BY FACEBOOK. THE
26 CONFLICT HAS BEEN ESTABLISHED BY FACEBOOK. I DON'T THINK ANY

1 TESTIMONY FROM ANY OF THE PRINCIPALS OF SIX4THREE IS GOING TO
2 CHANGE WHAT FACEBOOK HAS CREATED. AND THAT IS AN UNAVOIDABLE,
3 UNWAIVABLE CONFLICT THAT PREVENTS MY CLIENT FROM PROPERLY
4 ADVISING SIX4THREE. IT JUST CAN'T DO IT.

5 THE COURT: ALL RIGHT. SO THAT WE'RE CLEAR, RECITE
6 FOR THE RECORD WHAT THE UNWAIVABLE CONFLICT IS. ARE YOU
7 SAYING THAT THE UNWAIVABLE CONFLICT IS THE FACT THAT THERE
8 WILL BE DISCOVERY BOTH AS TO THE ATTORNEYS AND TO THE CLIENTS?

9 MR. MURPHY: THAT'S PART OF IT, YOUR HONOR. I THINK
10 IF YOU TAKE A LOOK AT THE OPPOSITION FILED BY FACEBOOK TO THE
11 MOTION TO BE RELIEVED AS COUNSEL, THAT CLEARLY SHOWS WHERE THE
12 CONFLICT EXISTS. AND BECAUSE OF THAT POTENTIAL CONFLICT
13 BECAUSE OF THE UNWAIVABLE ASPECT OF THAT CONFLICT FOR FACEBOOK
14 TO ACCUSE MY CLIENT ITSELF AND MR. GODKIN HIMSELF VIOLATING
15 THE COURT ORDER AND AIDING AND ABETTING THE CLIENT ALLEGEDLY
16 VIOLATING THE COURT ORDER, MY CLIENT'S HANDS ARE TIED. IT
17 CANNOT PROPERLY ADVISE SIX4THREE. SIX4THREE NEEDS INDEPENDENT
18 COUNSEL TO ADVISE IT.

19 SO WHEN YOU TALK ABOUT THE BREAKDOWN OF THE
20 ATTORNEY/CLIENT RELATIONSHIP, IT'S NOT JUST BECAUSE THE CLIENT
21 IS NOT PAYING THE LAWYER OR THERE MAY BE SOME OTHER ASPECTS
22 BETWEEN THE RELATIONSHIP OF THE LAWYER AND THE CLIENT THAT HAS
23 RESULTED IN THE IRREDEMIABLE BREAKDOWN OF THE RELATIONSHIP.
24 IT'S WHAT THEY'VE CREATED. THEY HAVE CREATED A SITUATION
25 WHERE MY CLIENT IS UNABLE TO DISCHARGE ITS PROFESSIONAL
26 RESPONSIBILITIES TO SIX4THREE.

1 IT HAS CREATED -- FACEBOOK HAS CREATED A SITUATION
2 WHERE THERE IS AN UNWAIVABLE CONFLICT BETWEEN THE INTEREST OF
3 BIRNBAUM AND GODKIN ON ONE HAND AND SIX4THREE ON THE OTHER.
4 SO I UNDERSTAND THE COURT'S CONCERN ABOUT THE IN CAMERA, BUT I
5 THINK THE ISSUE OF THE CONFLICT HAS BEEN IDENTIFIED BY
6 FACEBOOK IN ITS OPPOSITION. AND I WOULD SUBMIT ON THAT BASIS
7 ALONE THE MOTION SHOULD BE GRANTED.

8 THE OTHER THING, YOUR HONOR, IS I WOULD REQUEST
9 RESPECTFULLY BECAUSE I HAVE A LOT OF RESPECT FOR THE COURT IS
10 THAT THE HEARINGS ON FRIDAY BE DEFERRED BECAUSE IF THE COURT'S
11 RULING IS GOING TO STAND, WE WOULD LIKE THE OPPORTUNITY TO AT
12 LEAST HAVE IT REVIEWED PURSUANT TO A WRIT PROCEEDING.

13 MR. SULLIVAN: THANK YOU, YOUR HONOR. DON SULLIVAN
14 FOR MR. GROSS. I WOULD JUST ADD THAT THERE IS A FUNDAMENTAL
15 BREAKDOWN IN THE ATTORNEY/CLIENT RELATIONSHIP AND THAT IS
16 ALTERNATE GROUND FOR GRANTING THE MOTION. I AGREE 100 PERCENT
17 WITH WHAT MR. MURPHY SAID.

18 ADDITIONALLY, MR. GROSS HAS BEEN ALLEGED TO BE
19 ALLUDING OR ENGAGING IN VARIOUS ACTIVITIES WITH SIX4THREE AND
20 HE CANNOT DEFEND HIMSELF. THAT'S THE CONFLICT. HE CANNOT
21 DEFEND HIMSELF BECAUSE OF THE ATTORNEY/CLIENT PRIVILEGE, WHICH
22 MR. KRAMER REFUSED TO WAIVE. SO THERE'S AN UNTENABLE
23 CONFLICT. THEIR INTEREST ARE DYNAMICALLY OPPOSED. HE CANNOT
24 DEFEND HIMSELF WHILE HE IS STILL COUNSEL FOR SIX4THREE. THANK
25 YOU.

26 THE COURT: MR. LERNER.

1 MR. LERNER: YOUR HONOR, YOU NEVER GOT AN ANSWER TO
2 YOUR QUESTION ABOUT WHAT THE CONFLICT IS. YOUR HONOR, THE
3 ARGUMENT THAT WE CREATED THAT CONFLICT HERE IS MADE UP.
4 OUR ARGUMENT IS THAT THERE WAS A NOW UNDENIABLE AND UNDISPUTED
5 VIOLATION OF THIS COURT'S ORDER. I THINK THE EASIEST WAY TO
6 DISCERN THAT THIS IDEA THAT WE CREATED A CONFLICT OR THAT
7 THERE EVEN IS ONE ON THE RECORD BEFORE THE COURT IS TO LOOK
8 BACK AT THE LAST TIME THERE WAS A SERIOUS PROBLEM HERE WHICH
9 WAS WHEN SIX4THREE DESTROYED THE RECORD AS TO ITS ALLEGED
10 BUSINESS AND HOW MUCH MONEY IT HAD MADE.

11 AND AT THAT TIME SIMILARLY WE SAID, "WHERE ARE THESE
12 DOCUMENTS AND WHY ON COUNSEL'S WATCH OBVIOUSLY DID THE
13 DOCUMENTS DISAPPEAR?" AT THAT TIME THERE WAS NO ARGUMENT THAT
14 BECAUSE SANCTIONS WERE BEING SOUGHT OR WE WANTED DISCOVERY
15 THAT COUNSEL HAD TO RUN FOR THE HILLS.

16 THIS IS MADE UP. WE ARE PURSUING THE PROBLEM THAT
17 THEY ARE MAKING. IT IS NOT A CONFLICT THAT HAS BEEN DESCRIBED
18 OR IDENTIFIED IN ANSWER TO YOUR HONOR'S QUESTION AT ALL SO
19 FAR. IF THEY WANT TO DO IT EVENTUALLY WITHOUT ASSERTING
20 PRIVILEGE TO YOUR POINT, THEY MIGHT. BUT THEY HAVE NOT YET.
21 AND THE ARGUMENT WE HAVE MADE ON THEIR FACE DO NOT ASSERT OR
22 CREATE A CONFLICT. AND THAT'S WHY IN ANSWERING YOUR QUESTION
23 THEY DIDN'T IDENTIFY A CONFLICT.

24 THE COURT: SO ARE YOU SEEKING -- I'M SORRY FOR
25 INTERRUPTING.

26 MR. LERNER: I APOLOGIZE FOR SPEAKING OVER YOU.

1 THE COURT: ALL RIGHT. SO ARE YOU SEEKING DISCOVERY
2 AS TO WHAT THE ATTORNEYS DID DURING THE COURSE OF THE LAST
3 SEVERAL MONTHS IN RELATION TO THE DISCLOSURE OF CONFIDENTIAL
4 INFORMATION PURSUANT TO THE STIPULATED PROTECTIVE ORDER?

5 MR. LERNER: YES, YOUR HONOR. AS YOU IDENTIFIED AND
6 EXPLAINED, WE NEED TO SATISFY THE BURDENS FOR DOING THAT. AND
7 THERE IS A HIGH BURDEN FOR DOING THAT, WHICH WE BELIEVE IS
8 SATISFIED HERE. AND IN THOSE CASES, THE CASES DO NOT SAY THAT
9 MERELY BECAUSE IN SOME INSTANCES DISCOVERY CAN BE REQUIRED
10 FROM COUNSEL, THAT CREATES A WAIVABLE CONFLICT THAT MUST MEAN
11 COUNSEL CAN'T PARTICIPATE IN THE CASE.

12 THE CASES DON'T SAY THAT. THEY SAY YOU MUST MEET
13 THE STANDARD FOR THE DISCOVERY. THEY DON'T SAY ONCE YOU MET
14 THAT STANDARD, COUNSEL IS OUT. NONE OF THE CASES SAY THAT AND
15 THEY HAVEN'T ARGUED AS MUCH.

16 THE COURT: OKAY.

17 MR. LERNER: IF I MAY VERY QUICKLY BEFORE THE
18 HEARING ON FRIDAY, THERE ARE A COUPLE OF OUTSTANDING ISSUES
19 WITH RESPECT TO YOUR HONOR'S ORDER. YOUR HONOR ASKED FOR BUT
20 DID NOT RECEIVE DECLARATIONS FROM THE QUOTE UNQUOTE "EXPERTS."
21 MR. DEHAYE IN PARTICULAR HAS NOT PROVIDED THAT DECLARATION.
22 GIVEN THAT THE SAME DOCUMENTS THAT YOUR HONOR ORDERED SEALED
23 KEEP ON POPPING UP, WE DON'T UNDERSTAND WHY PEOPLE WHO SIGNED
24 THE PROTECTIVE ORDER IN THIS CASE ARE BOUND BY IT AND WERE
25 WORKING FOR COUNSEL CAN'T PROVIDE THAT DECLARATION. AND IT'S
26 OBVIOUSLY TROUBLING TO US BECAUSE THESE DOCUMENTS AREN'T

1 SHOWING UP ON THE INTERNET BY MISTAKE.

2 WE NEED TO FIGURE OUT WHERE THEY ARE COMING FROM.
3 SO FOR MR. DEHAYE AND FRISSORA, WE DO BELIEVE THAT COUNSEL
4 SHOULD PROVIDE THE DECLARATIONS OR THE COURT SHOULD ORDER
5 THOSE EXPERTS WHO SIGNED THE DECLARATIONS AND SHOULD BE
6 SUBJECT TO YOUR HONOR'S JURISDICTION TO PROVIDE THEM.

7 THE LAST THING, WHICH I BELIEVE YOU IDENTIFIED AND
8 ALREADY PICKED OUT IS WHEN COUNSEL WANTED TO PROTECT
9 PRIVILEGE, EVERYTHING THAT MR. SCARAMELLINO DID WAS AS A
10 MEMBER OF THE LEGAL TEAM AND INDEED AS YOUR HONOR POINTED OUT
11 ON MAY 15TH, HE WROTE AND REPRESENTED TO THE THIRD PARTY,
12 "THANKS, FRANK. I AM AN ATTORNEY AND MEMBER OF THE LEGAL TEAM
13 HERE."

14 AND THEY SAID THEY WERE SUPERVISING EVERY STEP HE
15 TOOK. ALL OF HIS WORK WAS SUPERVISED BY THEM. THAT'S -- THAT
16 WAS THE ARGUMENT WHEN WE TRIED TO GET THE COMMUNICATIONS WITH
17 MR. SCARAMELLINO. NOW IN ANSWER TO YOUR HONOR'S QUESTION
18 ABOUT WHAT THE LEGAL TEAM DID, MEMBERS OF YOUR TEAM UNDER YOUR
19 INSTRUCTION OR ANYTHING ELSE. THE ANSWER TO YOUR QUESTION IS
20 MY FIRM, MY LAW FIRM I.E. NOT MR. SCARAMELLINO DID THE
21 FOLLOWING THINGS. AND WE DIDN'T CONDONE OR ASK
22 MR. SCARAMELLINO TO DO X, Y OR Z.

23 MR. SCARAMELLINO SHOULD SIGN A DECLARATION JUST LIKE
24 MR. GODKIN CLARIFYING WHO, IF ANYONE, HE SHARED THIS
25 INFORMATION WITH. SO THAT WE CAN START TO GET TO THE BOTTOM
26 AGAIN OF WHERE THIS INFORMATION IS COMING FROM AND WHY IT

1 KEEPS ON POPPING UP NOTWITHSTANDING THIS COURT'S ORDERS.

2 SO THOSE WERE THE THREE THINGS THAT WE BELIEVE WOULD
3 BE HELPFUL BEFORE THE HEARING ON FRIDAY. AND WE APPRECIATE
4 YOUR HONOR'S TIME.

5 THE COURT: THANK YOU. MR. RUSSO.

6 MR. RUSSO: THANK YOU, YOUR HONOR. I WOULD JUST
7 LIKE YOUR HONOR TO HAVE OR TAKE NOTICE OF AND CERTAINLY I CAN
8 HAND YOU MY COPY OF IN RE KOEHLER. IN RE KOEHLER IS THE CASE.

9 THE COURT: I READ THAT CASE. I READ IT RIGHT
10 BEFORE OR RIGHT AFTER I BECAME A JUDGE. THERE IS NO CONTEMPT
11 ORDER THAT'S BEING ISSUED. SO WHAT'S THE BASIS FOR THE
12 REFERENCE?

13 MR. RUSSO: THIS IS THE CONUNDRUM, YOUR HONOR. IT'S
14 WHY YOU'RE HAVING THESE DIAMETRIC VIEWS IN MY VIEW WHY THE
15 LAWYERS ARE SO CONCERNED. FACEBOOK CONTINUES TO ASSERT
16 AGAINST BOTH THE LAWYERS AS WELL AS AGAINST SIX4THREE THE
17 ENTITY AS WELL AS AGAINST SIX4THREE'S PRINCIPALS. THE TWO
18 GENTLEMEN THAT YOU JUST TALKED WITH IN CHAMBERS. THAT THERE
19 WILL SHORTLY BE A CONTEMPT FILING.

20 THEY HAVEN'T SAID WHETHER IT'S CIVIL. THEY HAVEN'T
21 SAID WHETHER IT'S CRIMINAL. THEY HAVEN'T SAID WHETHER IT'S
22 HYBRID. SOMETIMES CALLED CIVIL PUNITIVE. KOEHLER LAYS OUT
23 THE RULES THAT FACEBOOK MUST FOLLOW. WE SENT A COPY TO
24 KOEHLER ALMOST WITHIN A WEEK OF US STARTING REPRESENTATION
25 SAYING "WHAT'S THE END GAME?" WE NEVER GOT A RESPONSE. WE
26 ISSUED FIVE QUESTIONS.

1 WHAT ARE THE ACTS OF CONTEMPT? WHAT ARE THE
2 ALLEGATIONS OF CAPABILITY TO FOLLOW THE ORDER OF THIS COURT?
3 WHAT IS THE EVIDENCE YOU'RE ASSERTING OF WILLFULNESS? WE LAID
4 OUT THESE QUESTIONS. SILENCE. WE RESENT THE QUESTIONS TO ALL
5 THE LAWYERS ON THE FACEBOOK SIDE. THERE'S LIKE SIX OF THEM.
6 SILENCE.

7 IT'S DEAFENING BECAUSE THEY WANT TO CLOBBER BOTH THE
8 LAWYERS AS WELL AS SIX4THREE AS WELL AS THE INDIVIDUALS, BUT
9 NOT ACTUALLY TAKING THE POSITION OF ARE THEY GOING TO CHARGE
10 THESE INDIVIDUALS AND LAWYERS WITH CRIMINAL CONTEMPT? IN
11 WHICH CASE IT'S A JURY TRIAL. IT'S A RIGHT TO COUNSEL. IT'S
12 A RIGHT TO DEFEND THEMSELVES. AND THEY HAVE TO PROVE THIS
13 BEYOND A REASONABLE DOUBT.

14 I'M NOT SURE YOUR HONOR CAN BE THE PERSON THAT WOULD
15 ACTUALLY TRY THAT CASE THAT KOEHLER ADDRESSES THAT QUESTION.
16 I'M NOT SURE THAT THE FACEBOOK LAWYERS CAN ACTUALLY BE THE
17 LAWYERS WHO BRING THAT CHARGE. THEY MAY WELL HAVE TO GO TO
18 THE DISTRICT ATTORNEY AND ASK THE DISTRICT ATTORNEY TO BRING
19 THAT CHARGE. THAT GOES INTO THE CRIMINAL DIVISION OF THIS
20 COURT, NOT NECESSARILY THE CIVIL DIVISION.

21 IF IT IS CIVIL CONTEMPT, WHAT IS IT THAT THEY'RE
22 AFTER? EVERY ORDER THAT YOUR HONOR HAD SAID I KNOW HOW MUCH
23 TIME HAS BEEN SPENT INCLUDING THESE LAWYERS TRYING TO
24 SCRUPULOUSLY FOLLOW WHAT YOUR HONOR HAS ASKED THEM TO DO.
25 FACEBOOK NEVER WENT TO THE UNITED KINGDOM WHERE THE
26 PARLIAMENT'S ORDER WAS ISSUED WHERE THE CONTEMPT CITATION WAS

1 MADE ON MR. KRAMER PERSONALLY AFTER MULTIPLE NOTICES FROM
2 MR. GODKIN.

3 THAT'S THE PART OF THIS CASE THAT'S COMPLETELY
4 SILENT. THAT'S THE PART OF THIS CASE THAT GETS TO THERE'S NO
5 WILLFULNESS. MR. KRAMER WAS AS SCARED AS HE HAS BEEN IN THIS
6 COURTROOM IN FRONT OF YOUR HONOR AS WELL AS IN CHAMBERS IN
7 DEALING WITH THIS PROBLEM WHICH IS WHAT AM I SUPPOSED TO DO?
8 GO TO JAIL IN THE U.K.?

9 THE COURT: MR. RUSSO, YOU HAVE OPENED UP THE DOOR
10 TO A LOT MORE THAN THE SCOPE OF THESE PROCEEDINGS. I HAVE
11 READ SEVERAL DOCUMENTS NOW AND I REREAD SOME DECLARATIONS.
12 AND WITHOUT PASSING JUDGMENT OR MAKING A RULING ON WHAT YOU'RE
13 SAYING, IT APPEARS BASED UPON WHAT I HAVE READ THAT THE
14 DISCLOSURE OF THOSE DOCUMENTS WAS T'D UP WEEKS BEFORE. MAYBE
15 EVEN MONTHS BEFORE THE ACTUAL DISCLOSURE.

16 AND IT APPEARS THAT MR. KRAMER HAD THE CONFIDENTIAL
17 INFORMATION BY AT LEAST NOVEMBER 2ND WHICH IS LONG BEFORE. AT
18 LEAST TWO WEEKS BEFORE THE LETTER STARTED COMING FROM THE
19 DCMS. THAT'S JUST WHAT THE DECLARATIONS ABOUT WHAT THE EMAILS
20 SAY, WHICH ARE REALLY INCONSISTENT WITH THE DECLARATION. BUT
21 THOSE EMAILS ARE ATTACHED TO YOUR OWN CLIENT'S DECLARATION.

22 MR. RUSSO: SO ISN'T THE CORRECT PROCEDURE THEN AS
23 SUGGESTED IN EARLIER PROCEEDINGS FACEBOOK SHOULD REQUEST AN
24 ORDER TO SHOW CAUSE, MAKE A POSITION OR TAKE A POSITION ON
25 WHETHER IT'S CRIMINAL OR CIVIL OR HYBRID. AND THEN KOEHLER
26 HAS TO BE STRICTLY FOLLOWED. THAT'S THE RULE IN THIS

1 DISTRICT. THAT'S THE RULE IN CALIFORNIA.

2 AND THAT'S WHAT THESE LAWYERS ARE WORRIED ABOUT,
3 RIGHTFULLY WORRIED ABOUT BECAUSE IN THE CASE MANAGEMENT
4 CONFERENCE STATEMENT COUNSEL FOR FACEBOOK WERE VERY CLEAR THEY
5 ARE FILING TWO MOTIONS ON SPECIFIC DAYS. THEY'VE ACTUALLY
6 SAID THIS IN YOUR LATEST CASE MANAGEMENT CONFERENCE STATEMENT.
7 THEY SAID, "WE ARE FILING A MOTION FOR TERMINATING SANCTIONS."
8 THERE'S A BIG ISSUE THERE, A FOOTNOTE. "WHILE THE CASE IS ON
9 APPEAL AND OTHERWISE STAYED MAY BE POTENTIALLY REMOVING
10 APPELLATE JURISDICTION." YOU CAN DEAL WITH THAT SEPARATELY.

11 "BUT WE'RE ALSO FILING A CONTEMPT CHARGE." THEY
12 DON'T SAY IF IT'S CIVIL. THEY DON'T SAY IF IT'S CRIMINAL.
13 THEY DON'T SAY IF IT'S HYBRID. THEY ALSO DON'T SAY WHO IS
14 GOING TO BE SUBJECT TO CONTEMPT. THEY ARE NOW SUGGESTING I
15 THINK AT LEAST INDIRECTLY THAT THERE ARE EXPERTS INCLUDING A
16 COUPLE OVERSEAS EXPERTS. THIS GENTLEMAN NAMED MR. DEHAYE HAS
17 A LAWYER, I BELIEVE, IN SWITZERLAND. THERE'S SOME REFERENCE
18 OR SOMEWHERE IN THE EUROPEAN UNION REFERENCED TO A LAWYER
19 WRITING TO COUNSEL OF FACEBOOK SAYING THE PARTICULAR EXPERT IS
20 REPRESENTED BY COUNSEL BUT LIVES OVERSEAS. IS THERE
21 JURISDICTION?

22 KOEHLER IS VERY CLEAR THERE HAS TO BE PERSONAL
23 SERVICE OF THE ORDER TO SHOW CAUSE. MR. SCARAMELLINO LIVES IN
24 NEW YORK. I THINK HE'S VOLUNTEERED TO COME HERE. HE IS NOT
25 HERE EVERY DAY OF THE WEEK. HE'S NOT A CALIFORNIA LAWYER YET.
26 HE HAS PASSED THE BAR EXAM, BUT HE HASN'T YET OFFICIALLY

1 GOTTEN HIS LICENSE CERTIFICATE. HE'S STATED THAT TO THE
2 COURT. I THINK HE WOULD APPEAR. I THINK HE WOULD DEFEND
3 HIMSELF. HE NEVER INTENDED TO VIOLATE THE ORDER.

4 MR. KRAMER NEVER INTENDED TO VIOLATE THE ORDER.
5 YOU'VE HEARD ALL THESE THINGS, BUT WE HAVE TO GET THE RIGHT
6 PROCEDURE DONE. THIS IS MY POINT. I THINK THESE LAWYERS
7 WOULD CORRECTLY -- I THINK YOUR HONOR IS CORRECT IN SAYING THE
8 CONFLICT IS NOT YET MATURE BECAUSE FACEBOOK HASN'T FILED A
9 CONTEMPT MOTION SO MAYBE THE LAWYERS SHOULD CONTINUE TO
10 REPRESENT, BUT THEY'RE ANTICIPATING IT. THEY'VE LAWYERED UP.
11 THEY COULD SEE WHAT'S COMING. THEY COULD SEE THE STORM
12 COMING.

13 SO NOW THE QUESTION IS WHAT'S THE RIGHT PROCEDURE?
14 I KNOW NO CASE THAT IS POST KOEHLER THAT SAYS THE RIGHT
15 PROCEDURE IS FACEBOOK GETS TO SUGGEST TO FILE A CONTEMPT
16 WITHOUT SAYING WHAT IT IS. AND THEY GET TO DO DISCOVERY AS
17 THOUGH IT'S A NEW LAWSUIT. THE CASE IS OTHERWISE STAYED. THE
18 RIGHT APPROACH UNDER KOEHLER IS THEY HAVE TO DO THE EXACT
19 STEPS THAT KOEHLER SAYS. AND THEN YOUR HONOR COULD DECIDE IF
20 IT'S CRIMINAL, WHAT ARE THE RULES ON DISCOVERY IN CRIMINAL
21 CASES? THEY'RE VERY DIFFERENT THAN IN CIVIL CASES. A LOT OF
22 STUFF IS DIFFERENT BETWEEN CRIMINAL AND CIVIL, AS YOUR HONOR
23 KNOWS.

24 THE COURT: THE FOCUS OF KOEHLER WAS THE CONFLICT
25 BETWEEN DIRECT CONTEMPT AND INDIRECT CONTEMPT. THE JUDGE IN
26 KOEHLER THE TRIAL JUDGE IN KOEHLER JAILED SOMEONE FOR

1 SOMETHING THAT WAS ESSENTIALLY INDIRECT CONTEMPT, WHICH THE
2 COURT CANNOT DO. AND THERE ARE PROCEDURES TO GOVERN THAT FACT
3 PATTERN. AND THAT'S WHY THE COURT OF APPEAL ARTICULATED WHAT
4 INDIRECT CONTEMPT WAS AND THE PROCEDURES WITHIN INDIRECT
5 CONTEMPT. I UNDERSTAND THAT.

6 MR. RUSSO: THERE'S NO QUESTION. FACEBOOK IS NOT
7 SAYING THAT THERE'S BEEN A DIRECT CONTEMPT IN FRONT OF YOUR
8 HONOR. FACEBOOK IS SAYING SOME TIME AT THE POINT AT WHICH
9 MR. KRAMER WAS IN LONDON EVEN AFTER NOTICES WERE SENT TO
10 FACEBOOK UNDER SECTION 16 OF THE STIPULATED PROTECTIVE ORDER
11 AND FACEBOOK DID NOTHING FOR DAYS FOR WEEKS. ARGUABLY FOR
12 MONTHS BECAUSE IT IS NOT CLEAR THAT THEY COULD DO SOMETHING
13 EVEN IN THE U.K. NOW.

14 THEY SIMPLY IGNORED SECTION 16. AND KRAMER FELT
15 LIKE HE WAS GOING TO JAIL IN LONDON BECAUSE HE WAS THE SUBJECT
16 TO A PARLIAMENTARY CONTEMPT. SO NOW THE QUESTION IS UNDER
17 KOEHLER WHAT IS IT THAT THEY MUST DO? THEY HAVE TO TAKE A
18 POSITION HERE. AT THAT POINT THE LAWYERS CAN TAKE A POSITION
19 ABOUT THERE BEING CONFLICT.

20 IF FACEBOOK WANTS TO AND I THINK THIS IS THE POINT
21 THAT WAS JUST MADE TO YOU. IF FACEBOOK WANTS TO WAIVE AT
22 LEAST ITS POSITIONS ON CONTEMPT AT LEAST AS AGAINST THE
23 LAWYERS FOR SIX4THREE SO THAT THEY COULD PROCEED KNOWING THAT
24 THEY'RE NOT GOING TO END UP HURTING THEMSELVES, THEN THEY'VE
25 GOT TO DO THAT. THEY CAN'T HAVE IT BOTH WAYS.

26 I THINK THAT'S WHAT'S PRETTY CLEAR AT THIS POINT,

1 YOUR HONOR. THEY CAN'T SAY RUSH RUSH RUSH, GIVE US WHAT WE
2 WANT. BUT BY THE WAY WE'RE RESERVING ALL OUR RIGHTS TO
3 CLOBBER THE LAWYERS, THE COMPANY, AS WELL AS THE PEOPLE BEHIND
4 THE COMPANY.

5 THE COURT: THERE ARE TWO ISSUES HERE BEFORE I HEAR
6 FROM MR. LERNER, MR. RUSSO. AND THEN ALSO FROM MR. MURPHY.
7 FIRST OF ALL, I'M SURE ALL COUNSEL IN THIS ROOM WILL AGREE
8 THAT VIOLATION OF THE STIPULATED PROTECTIVE ORDER AND ALSO MY
9 MOTION TO SEAL ORDER IS UNPRECEDENTED. NOTHING WITH THE SCOPE
10 OF THIS VIOLATION HAS EVER HAPPENED. IT'S NOT THERE. THERE
11 IS NO CASE LAW ON THIS. THIS IS UNPRECEDENT. THIS IS A CASE
12 OF FIRST IMPRESSION. ESPECIALLY WITH THE BREADTH OF THE
13 EFFECT OF THIS DISCLOSURE, THIS VIOLATION.

14 THIS VIOLATION HAS RESULTED IN REPEATED CIRCULATION
15 OF HIGHLY CONFIDENTIAL AND CONFIDENTIAL INFORMATION WORLDWIDE.
16 AND FACEBOOK FROM WHAT I'VE READ WANTS TO STOP THAT. THAT'S
17 THE FIRST THING THAT HAS TO BE ADDRESSED. EVERYTHING THAT
18 FLOWS FROM THIS AS TO WHETHER OR NOT THERE SHOULD BE
19 DISCIPLINE OR PUNISHMENT OR DETERMINING WHETHER THERE WAS A
20 VOLUNTARY DISCLOSURE IS SOMETHING THAT FACEBOOK IS SEEKING
21 NOW.

22 CAUGHT IN THE WAVE OF ALL OF THIS ARE THE ATTORNEYS
23 THAT REPRESENT THE RESPECTIVE PARTIES MR. SCARAMELLINO AND
24 WHILE HE'S PART OF THE LEGAL TEAM, BUT MR. KRAMER CERTAINLY.
25 AND THERE HAS TO BE SOME EXPLANATION AS TO WHY THIS HAPPENED.

26 THERE ARE LOTS OF EMAILS THAT HAVE BEEN SENT TO

1 MEMBERS OF THE PRESS, GOVERNMENTAL ENTITIES, STATES, FOREIGN
2 GOVERNMENTS MEANING GREAT BRITAIN AND COMMITTEES THEREUNDER
3 THAT ADDRESS DISCUSSIONS ON THE INFORMATION THAT'S THE SUBJECT
4 OF THIS LITIGATION TODAY. THAT IS TO SAY THE CONFIDENTIAL AND
5 HIGHLY CONFIDENTIAL INFORMATION.

6 COMMENTS HAVE BEEN MADE BY ALL PARTIES RELATING TO
7 THE INFORMATION ON FACEBOOK THAT EXISTS AND SUBJECT TO A
8 PROTECTIVE ORDER. HOWEVER, THERE HAS TO BE SOME MECHANISM TO
9 MAKE THIS PUBLIC. THAT'S WHAT THOSE EMAILS SAY. DOES ANYONE
10 DISAGREE WITH THAT? SPEAK UP NOW BECAUSE THAT'S WHAT THEY
11 SAY. AND BECAUSE OF THAT, FACEBOOK BELIEVES THAT THIS CASE
12 HAS BEEN T'D UP FOR DISCLOSURE WHICH IS MORE IMPORTANT THAN
13 SEEKING PECULIARY RECOMPENSE BY SIX4THREE AGAINST FACEBOOK.

14 MR. RUSSO: YOUR HONOR, I AM NOT HERE TO CHALLENGE
15 YOUR INTERPRETATION OF THE EMAILS OF THE DECLARATIONS. I AM
16 HERE TO SAY THE RIGHT PROCEDURE UNDER KOEHLER IS NOT TO DO A
17 PRELIMINARY HEARING TO SORT OF PREJUDGE WHAT WOULD A CRIMINAL
18 CONTEMPT PROCEEDING LOOK LIKE. WHAT WOULD A HYBRID PROCEEDING
19 LOOK LIKE. WHAT WOULD A CIVIL PROCEEDING LOOK LIKE.

20 I UNDERSTAND YOU WANT TO GET YOUR ARMS ACROSS WHERE
21 ARE THESE DOCUMENTS? WHERE ARE THEY GOING? THE REALITY IS
22 ONCE THE U.K. SUBPOENAED AND MR. KRAMER UNDER THE PAIN OF
23 CONTEMPT TURNED OVER DOCUMENTS, THE REALITY IS THEY ARE IN THE
24 CONTROL OF THE U.K. PARLIAMENT. THEY ARE NOT IN THE CONTROL
25 UNFORTUNATELY OF THIS COURT. THEY ARE NOT UNDER THE CONTROL
26 OF MR. KRAMER. THEY ARE NOT UNDER THE CONTROL OF

1 MR. SCARAMELLINO. THEY ARE NOT UNDER THE CONTROL OF THE
2 LAWYERS. THEY ARE CERTAINLY NOT IN MY CONTROL.

3 THE RIGHT PROCEDURE IS FOR FACEBOOK TO GO TO THE
4 COURTS IN THE U.K. THEY HAVE AN OFFICE IN THE U.K. THEY HAVE
5 AN EMPLOYEE WHO IS APPARENTLY PART OF THE U.K. PARLIAMENT.
6 THEY HAVE AN ACTUAL EMPLOYEE WHO IS AN OFFICER OF FACEBOOK
7 U.K. WHILE SERVING IN PARLIAMENT. THEY NEED TO GO TO THE
8 RIGHT COURT TO SAY, "THIS WAS A VIOLATION OF CONFIDENTIALITY
9 IN THIS COURT. PLEASE RESPECT THAT." AND GET A COURT IN THE
10 U.K. TO STOP WHAT'S HAPPENING.

11 THEY ARE APPARENTLY CHOOSING NOT TO DO THAT. THAT'S
12 A CHOICE THEY'VE MADE AS A PUBLIC COMPANY WEEKS AND NOW MONTHS
13 LATER. THERE'S NOTHING WE CAN DO, YOUR HONOR, FRANKLY. YOU
14 CAN ISSUE MORE ORDERS. MR. KRAMER CAN'T CAUSE SOMETHING TO
15 HAPPEN NOR CAN SIX4THREE NOR CAN MR. SCARAMELLINO NOR CAN
16 THESE LAWYERS.

17 THE REALITY RIGHT NOW IS IS THERE GOING TO BE
18 PUNISHMENT? IS THAT WHAT FACEBOOK IS AFTER? I'VE SAID THIS
19 OVER AND OVER AGAIN. WHAT'S THE END GAME? ARE THEY GOING TO
20 PUNISH THESE GENTLEMEN? LET'S GET THAT ON THE TABLE FRANKLY.
21 IF THERE IS GOING TO BE A CRIMINAL CONTEMPT PROCEEDING, LET'S
22 GET IT ON THE TABLE. LET'S GET THE CASE SET FOR TRIAL. LET'S
23 GO FORWARD IN ACCORDANCE WITH IN RE KOEHLER.

24 IF THAT'S NOT GOING TO HAPPEN, THE THREAT HAS TO
25 STOP BECAUSE THE THREAT IS WHAT'S CAUSING THE DYSFUNCTION.
26 THE CONTINUED THREATS ARE CAUSING THE DYSFUNCTION IN THE

1 LAWYERS LAWYERING UP. AND THE LAWYERS SAYING THERE'S A
2 CONFLICT BECAUSE THE LAWYERS CAN SEE. THEY'RE DRIVING RIGHT
3 TOWARDS THE STORM HERE WHICH IS IF FACEBOOK DOES FILE THAT
4 CONTEMPT PROCEEDING, WHAT THEN HAPPENS?

5 THE COURT: MR. RUSSO, YOU WEREN'T PRIVY TO THIS.
6 YOU PROBABLY READ THE TRANSCRIPT OF THE NOVEMBER 30TH, 2018,
7 HEARING.

8 MR. RUSSO: I DID. I WAS NOT THERE.

9 THE COURT: AND I HAVE IT RIGHT HERE. I ASKED
10 REPEATEDLY HOW DID MR. KRAMER RECEIVE THE UNREDACTED
11 CONFIDENTIAL INFORMATION IN ORDER TO -- FOR THAT INFORMATION
12 TO BE GIVEN ULTIMATELY TO THE DCMS WHEN HE WAS SUBJECT TO THE
13 PROTECTIVE ORDER? AND UNDER THE PROTECTIVE ORDER HE WAS NOT
14 ALLOWED TO HAVE THAT INFORMATION. SUCH THAT THIS -- SOMETHING
15 LIKE THIS WOULD NOT HAPPEN. AND THE ANSWER IS -- THERE WAS NO
16 ANSWER. COUNSEL WERE NOT ABLE TO RESPOND TO THAT QUESTION.
17 THERE WAS NO ANSWER.

18 AND TO THIS DAY THERE IS NO ANSWER AS TO WHY MY
19 ORDER OR WHY THE COURT'S ORDER WAS VIOLATED BY VIRTUE OF
20 FURNISHING UNREDACTED INFORMATION TO MR. KRAMER. HE'S NOT
21 EVEN ENTITLED TO THAT UNDER THIS STIPULATED PROTECTIVE ORDER.
22 THAT'S WHERE THE ANALYSIS STARTS. SO THAT COUPLED WITH THE
23 EMAILS WAS TROUBLING TO THE COURT. IN ANY EVENT, I WILL HEAR
24 FROM MR. LERNER.

25 MR. RUSSO: THANK YOU, YOUR HONOR.

26 MR. LERNER: THANK YOU, YOUR HONOR. EVERYTHING YOU

1 JUST HEARD ABOUT KOEHLER AND THIS CONTEMPT ISSUE BECAUSE YOUR
2 HONOR IS FAMILIAR WITH THE TRANSCRIPTS, YOU WILL RECOGNIZE YOU
3 HAVE NOW HEARD THREE TIMES. AND IT IS BECAUSE IT IS A
4 DISTRACTION AND YOUR HONOR ACCURATELY DESCRIBED EXACTLY WHAT
5 WE ARE DOING.

6 WE NEED TO FIRST AND FOREMOST FIGURE OUT WHERE OUR
7 HIGHLY CONFIDENTIAL INFORMATION IS AS A RESULT OF THE
8 VIOLATIONS OF THIS COURT'S ORDERS. AND I DEFY IN ANYONE TO
9 LOOK THROUGH THE ARGUMENTS OR REQUESTS WE HAVE BEEN MAKING FOR
10 THE LAST COUPLE OF MONTHS TO SUGGEST OTHERWISE 'CAUSE THAT'S
11 WHAT WE'VE BEEN FOCUSED ON AND THAT'S WHAT YOUR HONOR HAS BEEN
12 DOING.

13 AND THE SEQUENCE OF EVENTS THAT YOUR HONOR DESCRIBED
14 IS EXACTLY ACCURATE. AND NOT SURPRISINGLY THERE'S NO CASE NOR
15 ANY LOGIC THAT WOULD SUGGEST THAT IN A SITUATION WHERE YOU
16 HAVE AN UNPRECEDENTED BREACH OF A PROTECTIVE ORDER THAT THE
17 PARTIES WOULD SUDDENLY JUMP TO AS COUNSEL IS SUGGESTING A
18 CONTEMPT HEARING AND STOP ANY OTHER DISCOVERY SO THAT THE
19 PARTY WHO IS INJURED BY THE DISCLOSURE HAS NO ABILITY TO
20 FIGURE OUT WHERE ALL THAT STUFF IS. I DON'T TO YOUR POINT
21 KNOW EVERYTHING WE'RE GOING TO LEARN, BUT I DO NEED TO FIND
22 OUT WHERE THESE DOCUMENTS ARE.

23 THAT IS MY FIRST AND MOST IMPORTANT JOB RIGHT NOW
24 AND WHAT WE'RE TRYING TO GET TO. EVERYTHING YOU JUST HEARD
25 ABOUT HAS NOTHING TO DO WITH THE WITHDRAWAL. IT HAS NOTHING
26 TO DO WITH THE DISCOVERY HEARING ON FRIDAY. IT IS A

1 DISTRACTION INTENDED TO AVOID EXACTLY WHAT YOUR HONOR. AND WE
2 HAVE BEEN TRYING TO GET TO THE BOTTOM OF WHICH IS WHERE IS
3 THIS INFORMATION?

4 ONE FINAL NOTE. EVERY TIME YOUR HONOR PROVIDES EVEN
5 A SLIGHT RAY OF SUNSHINE ON THE FACTS IN THIS CASE, THE FACTS
6 ARE DEMONSTRABLY CONTRARY TO WHAT EVERYONE HAS SAID ON THAT
7 SIDE OF THE "V" SO FAR. YOU CAN LOOK THROUGH EVERY ORDER YOU
8 HAVE GIVEN. IT ENDS UP ALWAYS BEING THE CASE. AND EVEN THE
9 RECENT DISCLOSURE WE HAD FROM STROZ FRIEDBERG. AND
10 MR. KRAMER IS HERE TODAY. HE CAN TELL US ABOUT THIS, IF HE
11 WANTS TO.

12 UNLESS I'M MISTAKEN, AS YOUR HONOR RECALLED, THE
13 DISCLOSURE IS ON NOVEMBER 21ST, RIGHT? AND WHAT YOU JUST
14 HEARD IS HE WAS SO SURPRISED. HE WENT TO LONDON, GOT A PLACE
15 ACROSS THE STREET AFTER INVITING A SUBPOENA IN THE U.S. BUT
16 SAYING, "IF I DO IT HERE, I WILL HAVE TO GET FACEBOOK
17 INVOLVED, SERVE ONE IN THE U.K." MIRACULOUSLY HE SHOWS UP
18 THERE. AND THEN EVEN THOUGH HE TAKES HIS LAPTOP AND
19 THUMB-DRIVE ACROSS THE STREET, THEY WANT YOU TO BELIEVE HE WAS
20 SOMEHOW SURPRISED AND THIS WASN'T PLANNED.

21 BUT WHAT IS STROZ FRIEDBERG ABLE TO FIND OUT WITH
22 THE VERY LIMITED INFORMATION THEY WERE ABLE TO LOOK AT THAT
23 THEY TOLD YOUR HONOR ABOUT YESTERDAY? WHAT DID HE DO THE DAY
24 BEFORE? THE DAY BEFORE HE WENT IN TO CHANGE THE PASSWORD ON
25 THE DROPBOX ACCOUNT AFTER PROVIDING YOU SWORN DECLARATIONS
26 SAYING, "I NEVER LOOKED IN THE DROPBOX ACCOUNT."

1 SO EVEN THEIR STORIES THAT THEY WANT TO TELL YOU
2 ABOUT WHERE THIS IS GOING TO GO AT THE END, NONE OF IT MATCHES
3 UP. AND EVERY TIME YOU ALLOW ANY INQUIRY INTO THIS, WE LEARN
4 MORE ABOUT IT. AND WE ON FACEBOOK'S SIDE OF THE "V" IS
5 ABSOLUTELY CORRECT. WE'RE TRYING TO FIGURE OUT WHERE THIS
6 STUFF IS.

7 THE COURT: I THINK WE'RE DELVING INTO THE
8 CONFIDENTIAL ASPECT OF THE CASE. WE NEED TO STOP. THAT'S NOT
9 THE PURPOSE OF THIS HEARING TODAY. ALL I'M SAYING IS THAT
10 THERE ARE TROUBLING ISSUES CONCERNING THE CIRCULATION OF THIS
11 DATA. AND IT WAS SUBJECT TO ORDERS THAT THE COURT ISSUED.

12 AND THERE WAS NO UNDERSTANDING BY THIS COURT AS TO
13 HOW THIS INFORMATION WAS GIVEN TO MR. KRAMER SUCH THAT
14 MR. KRAMER DISCLOSED IT. THAT'S WHAT TROUBLES ME.

15 MR. RUSSO, I HAVE A QUESTION FOR YOU REGARDING YOUR
16 REPRESENTATION. MR. MURPHY.

17 MR. MURPHY: YOUR HONOR.

18 THE COURT: YES.

19 MR. MURPHY: I HATE TO INTERRUPT, IF I COULD REPLY?

20 THE COURT: YES.

21 MR. MURPHY: IT IS OUR MOTION. MOTION TO BE
22 RELIEVED. I WANT TO BRING IT BACK TO THAT.

23 THE COURT: YES.

24 MR. MURPHY: AND I KNOW THAT COUNSEL ESPECIALLY
25 MR. LERNER HAS RAISED ISSUES THAT I ACTUALLY TAKE OFFENSE TO
26 HIS SUGGESTION I HAVE SOMEHOW, MR. LASSART AND PEOPLE FROM MY

1 OFFICE MAY HAVE MISLED THE COURT. WE'RE ONLY HEAR ON THE
2 ISSUE OF THE MOTION TO BE RELIEVED. IT'S A SIMPLE MOTION.
3 WHAT'S UNUSUAL ABOUT THE MOTION IS THAT IT'S NOT BEING OPPOSED
4 BY THE CLIENT. IT'S BEING OPPOSED BY THE ADVERSARY.

5 AND FOR MR. LERNER TO SUGGEST THAT THERE IS NO
6 CONFLICT, IGNORES WHAT HE JUST ARGUED. IT IGNORES THE
7 ALLEGATIONS SET FORTH IN HIS OPPOSITION THAT MY CLIENT AIDED
8 AND ABETTED OR CONSPIRED WITH ITS CLIENT TO VIOLATE THE COURT
9 ORDER. THERE'S THE CONFLICT RIGHT THERE.

10 AND I SET FORTH IN MY OPENING STATEMENT. MY OPENING
11 ARGUMENT AS TO WHY THIS CONFLICT IS UNWAIVABLE. I MEAN IT'S
12 NOW DEMONSTRABLY SO BASED ON THE ARGUMENT OF COUNSEL.

13 I NEED TO JUST ADDRESS A COUPLE OF THINGS. ONE,
14 EVEN IF THE MOTION TO WITHDRAW IS GRANTED WHICH I BELIEVE IT
15 SHOULD BE BASED ON WHAT IS BEFORE THE COURT, MY CLIENT IS
16 STILL SUBJECT TO JURISDICTION. WE'RE NOT GOING TO IGNORE THE
17 JURISDICTION OF THE COURT TO OVERSEE ANY POTENTIAL SANCTIONS
18 MOTION THAT FACEBOOK MAY BRING.

19 SO WHAT'S THE PURPOSE? WHAT'S THE PURPOSE OF THEM
20 OPPOSING OUR EFFORTS TO WITHDRAW BASED ON THE CONFLICT THEY
21 HAVE RAISED? BECAUSE WE'RE THERE. WE'RE HERE. WE'LL BE
22 HERE. SO IT SEEMS TO ME UNNECESSARY FOR THEM TO ARGUE AGAINST
23 THE MOTION TO BE RELIEVED. ESPECIALLY WHEN THE CLIENT DOESN'T
24 OPPOSE IT.

25 THE COURT: ALL RIGHT. WELL, I THINK -- MR. MURPHY,
26 YOU HAD ANOTHER POINT?

1 MR. MURPHY: ONE FINAL POINT. THAT RELATED TO
2 MR. DEHAYE IN THE SUGGESTION THAT SOMEHOW DAVID GODKIN
3 CONTROLS MR. DEHAYE AND MR. DEHAYE'S FAILURE TO PROVIDE A
4 DECLARATION. MY CLIENT HAS NO CONTROL OVER MR. DEHAYE.

5 THIS MORNING I RECEIVED A COPY OF THE LETTER FROM
6 MR. DEHAYE'S LAWYER IN GREAT BRITAIN WHO SETS FORTH
7 MR. DEHAYE'S POSITION WITH RESPECT TO FACEBOOK'S CLAIM
8 RELATIVE TO THE DEHAYE PARTICIPATION AND POSSIBLY DISCLOSURE
9 OF INFORMATION.

10 IN THAT LETTER, COUNSEL POINTS OUT THAT FACEBOOK'S
11 LAWYERS WOULD NOT PROVIDE THE LETTER TO THE COURT AND
12 REQUESTED THAT THE LETTER BE PROVIDED TO THE COURT SETTING
13 FORTH MR. DEHAYE'S POSITION. I WOULD JUST REQUEST THAT I BE
14 ALLOWED TO PROVIDE THAT LETTER TO THE COURT BECAUSE I THINK
15 IT'S IMPORTANT TO CONSIDER IF THE COURT IS INCLINED TO GO
16 FORWARD ON THE CASE MANAGEMENT CONFERENCE.

17 AND, AGAIN, JUST TO CLOSE, IF THE COURT IS INCLINED
18 TO FOLLOW THROUGH WITH THIS DECISION TO DENY THE MOTION
19 WITHOUT PREJUDICE, I WOULD REQUEST THAT THE HEARINGS ON FRIDAY
20 BE DEFERRED. SO THAT THE DEFENSE CAN HAVE THE OPPORTUNITY TO
21 SEEK REVIEW BY THE COURT OF APPEAL. THANK YOU.

22 THE COURT: THANK YOU. WELL, I THINK --

23 MR. SULLIVAN: YOUR HONOR.

24 THE COURT: THERE IS ONE ISSUE THAT I'M SURE IS IN
25 THE BACK OF YOUR MIND THAT EVERYONE IS CONSIDERING WHICH IS IF
26 COUNSEL WITHDRAW, THE CORPORATION CANNOT REPRESENT ITSELF. WE

1 ALL KNOW THAT. AS A MATTER OF LAW A CORPORATION CANNOT APPEAR
2 IN PROPRIA PERSONA. AND BECAUSE OF THAT, THE ENTIRE
3 LITIGATION GRINDS TO A HALT. MASTER CANE HAD INDICATED IN HIS
4 DECLARATION THAT HE WAS THINKING ABOUT RETAINING OR BEING
5 RETAINED AS COUNSEL FOR SIX4THREE. THAT WAS WEEKS. NOW A
6 COUPLE OF MONTHS AGO AND HE HASN'T APPEARED IN THIS CASE. AND
7 THE COURT MAY HAVE TO TAKE SOME OTHER MEASURES WITH REGARD TO
8 A LITIGATION IF SIX4THREE IS UNREPRESENTED.

9 MR. MURPHY: YES, YOUR HONOR. AND I BELIEVE THAT
10 WHEN WE FIRST DISCUSSED THE ISSUE OF THE MOTION TO WITHDRAW,
11 IT WAS SET OUT FAR IN ADVANCE SO THAT SIX4THREE WOULD HAVE THE
12 OPPORTUNITY TO OBTAIN REPLACEMENT COUNSEL. ONE POTENTIAL
13 SOLUTION WOULD BE AN ORDER TO SHOW CAUSE WITH RESPECT TO
14 OBTAINING REPLACEMENT COUNSEL, GRANTING THE MOTION TO BE
15 RELIEVED, SET AN OSC OUT INTO THE FUTURE. AND IF THERE IS NOT
16 REPLACEMENT COUNSEL, THEN THE COURT CAN DO WHAT THE COURT CAN
17 DO UNDER ITS INHERENT POWER UNDER THE CODE OF CIVIL PROCEDURE
18 1204, I BELIEVE.

19 THE COURT: YES.

20 MR. MURPHY: THAT'S ONE POTENTIAL OPTION.

21 THE COURT: THANK YOU, MR. MURPHY.

22 MR. MURPHY: THANK YOU.

23 MS. MEHTA: YOUR HONOR, ON THAT POINT, I THINK WE'VE
24 CONFLATED A LOT OF DIFFERENT ISSUES HERE TODAY. I WANT TO
25 FOCUS FIRST ON THE LAST POINT FROM MR. MURPHY WITH RESPECT TO
26 THIS WITHDRAWAL QUESTION. AND THEN I WANT TO GO BACK TO THE

1 SEPARATE REQUEST FOR RELIEF IN ADVANCE OF FRIDAY'S HEARING.

2 ON THE WITHDRAWAL QUESTION, YOUR HONOR HAS HIT THE
3 NAIL IN THE HEAD IN TERMS OF THE TIMING PROBLEM. SIX4THREE
4 HAS HAD FOUR MONTHS. NEARLY FOUR MONTHS TO FIND NEW COUNSEL
5 AND THEY HAVEN'T FOUND IT. AND ALL OF THEIR SUGGESTIONS AS TO
6 WHAT THEY'VE DONE TO FIND NEW COUNSEL RAISE REAL QUESTIONS AS
7 TO WHETHER THEY'RE MAKING A GOOD FAITH EFFORT TO DO SO.

8 THEY'RE OBVIOUSLY HIGHLY INCENTIVIZED NOT TO DO SO.
9 AND THE QUESTION IS ARE WE REALLY GOING TO ALLOW THIS PROCESS
10 WHICH GOES BACK TO MR. LERNER'S POINT ABOUT NEEDING TO GET TO
11 THE BOTTOM OF WHERE OUR INFORMATION IS AND WHO HAS IT. ARE WE
12 REALLY GOING TO PUT THAT ON ICE WHILE SIX4THREE TRIES TO FIND
13 NEW COUNSEL, IF THEY'RE REALLY DOING THAT?

14 THE COMMENT TO RULE 1.16 EXPRESSLY ADDRESSED THIS
15 QUESTION. AND WHAT THE COMMENT SAYS IS "IF THE TRIBUNAL
16 DENIES A LAWYER PERMISSION TO WITHDRAW, THE LAWYER IS
17 OBLIGATED TO COMPLY WITH THE TRIBUNAL'S ORDER. THIS DUTY
18 APPLIES EVEN IF THE LAWYER SOUGHT PERMISSION TO WITHDRAW
19 BECAUSE OF A CONFLICT OF INTEREST."

20 THERE'S A MOTION TO REOPEN DISCOVERY THAT IS SET FOR
21 FRIDAY. THEY FILED AN OPPOSITION. THE LAWYERS ARE DUTY-BOUND
22 TO REPRESENT THEIR CLIENT AND SHOW UP TO THAT HEARING NOT
23 WITHSTANDING THEIR ASSERTION OF THIS UNPRONOUNCED CONFLICT
24 AND OPPOSE THAT REQUEST, IF THAT'S WHAT THEY'RE GOING TO DO.
25 AND THE COURT SHOULD DECIDE IT AND WE SHOULD MOVE FORWARD.

26 THAT ISSUE IS OF COURSE SEPARATE FROM WHAT

1 MR. LERNER IS ASKING FOR WHICH IS SIMPLY THAT YOUR HONOR
2 ENFORCE THE ORDER FROM A WEEK AND A HALF AGO ON THE EX PARTE.
3 WHAT WE STILL DON'T HAVE IS THREE THINGS WE STILL DON'T HAVE
4 THAT YOUR HONOR ORDERED.

5 THE FIRST ONE IS THERE WAS AN ALLEGED EXPERT WHO NO
6 ONE HAD HEARD ABOUT BEFORE. IT'S NOT EVEN CLEAR IF MR. GODKIN
7 KNEW ABOUT HIM BEFORE. MR. FRISSORA. MR. FRISSORA WENT TO
8 COLLEGE WITH MR. SCARAMELLINO. APPARENTLY MR. SCARAMELLINO
9 ENGAGED HIM IN THIS MATTER. HE RUNS A HEDGE FUND. I HAVE NO
10 IDEA WHAT HE POSSIBLY COULD HAVE BEEN DOING THAT COULD HAVE
11 BEEN RELEVANT TO THE MATTER.

12 BUT APPARENTLY HE WAS RETAINED AND MR. SCARAMELLINO
13 WAS WORKING WITH HIM AND HE MAY HAVE RECEIVED FACEBOOK
14 CONFIDENTIAL INFORMATION. NOTWITHSTANDING THE COURT'S ORDER
15 THAT THEY SUBMIT DECLARATIONS FROM ALL OF THESE PROPOSED
16 EXPERTS, NO DECLARATION FROM MR. FRISSORA. WE DON'T KNOW WHAT
17 HE HAD. WE DON'T KNOW IF HE STILL HAS IT. WE DON'T KNOW IF
18 HE DESTROYED ANYTHING.

19 WE HAVE NO IDEA WHAT INFORMATION MAY BE OUT IN THE
20 WILD WITH RESPECT TO HIM. THEY NEED TO SUBMIT A DECLARATION
21 FOR MR. FRISSORA. AND, IN FACT, THEY HAVEN'T EVEN EXPLAINED
22 IF THEY TRIED. WE DON'T EVEN KNOW IF THEY TRIED TO GET THAT
23 DECLARATION.

24 THE SECOND THING WE NEED IS A DECLARATION FROM
25 MR. DEHAYE. MR. DEHAYE EXPRESSLY SIGNED A PROTECTIVE ORDER
26 ACKNOWLEDGMENT SUBJECTING HIMSELF TO THIS COURT'S

1 JURISDICTION. HE NEEDS TO SUBMIT THE DECLARATION. AND WE ASK
2 FOR AN ORDER DIRECTING HIM TO DO SO.

3 AND THEN THE THIRD THING IS BECAUSE MR. SCARAMELLINO
4 APPARENTLY WAS THE ONLY ONE MANAGING MR. FRISSORA,
5 MR. SCARAMELLINO SHOULD SUBMIT A DECLARATION THAT DOES ALL OF
6 THE THINGS THAT MR. GODKIN WAS ORDERED TO DO WITH RESPECT TO
7 THE OTHER EXPERTS.

8 THOSE ARE THE THREE THINGS WE WOULD LIKE TO HAVE
9 BEFORE THE HEARING ON FRIDAY SO THAT YOUR HONOR HAS A FULL
10 PICTURE AS TO WHAT IS OUT THERE WITH RESPECT TO THESE SUPPOSED
11 EXPERTS BEFORE WE THEN TALK ABOUT THE REST OF THE ISSUES ON
12 CALENDAR FOR FRIDAY.

13 THE COURT: MR. RUSSO, I HAD A QUESTION FOR YOU.
14 YOU'RE REPRESENTING MR. KRAMER, CORRECT?

15 MR. RUSSO: INDIVIDUALLY, YES, YOUR HONOR.

16 THE COURT: AND YOU'RE REPRESENTING ALSO
17 MR. SCARAMELLINO, CORRECT?

18 MR. RUSSO: INDIVIDUALLY, YES.

19 THE COURT: MR. KRAMER IS THE PRINCIPAL FOR
20 SIX4THREE THE CORPORATION, CORRECT?

21 MR. RUSSO: MANAGING MEMBER, YES.

22 THE COURT: RIGHT. MR. SCARAMELLINO IS A MEMBER OF
23 THE BIRNBAUM GODKIN LEGAL TEAM, CORRECT?

24 MR. RUSSO: HE WAS. I UNDERSTAND THAT THEY SEVERED
25 TIES AS OF SOME DATE IN 2018 AFTER ONE OF THE HEARINGS.
26 PERHAPS ONE OF THE DECEMBER HEARINGS.

1 THE COURT: ISN'T THERE AN INHERENT CONFLICT
2 REPRESENTING BOTH MR. KRAMER AND MR. SCARAMELLINO INASMUCH AS
3 BOTH OF THEM HAVE OPPOSING RESPONSIBILITIES IN THIS
4 LITIGATION?

5 MR. RUSSO: WE'VE DISCLOSED THAT TO THEM, YOUR
6 HONOR. THEY HAVE EXPRESSLY WAIVED THAT CONFLICT AND ASKED ME
7 TO REPRESENT THEM. I UNDERSTAND THE PROBLEM. IT'S CERTAINLY
8 BEEN RAISED TO THEM. AND THEY CANNOT FRANKLY AFFORD TWO
9 SEPARATE COUNSEL IS WHAT I'VE BEEN TOLD.

10 THE COURT: THANK YOU. ALL RIGHT. ANYTHING FURTHER
11 FROM COUNSEL?

12 MR. SULLIVAN: YOUR HONOR.

13 THE COURT: MR. SULLIVAN.

14 MR. SULLIVAN: I UNDERSTAND FACEBOOK'S CONCERN.
15 THEY WANT TO KNOW WHERE THEIR DOCUMENTS ARE. MR. GROSS HERE
16 DOES NOT NEED TO BE REPRESENTING SIX4THREE TO MAKE THAT
17 HAPPEN. AS YOU CAN SEE FROM THE EMAILS THAT WERE ATTACHED TO
18 THE OPPOSITION OF THE MOTION TO WITHDRAW, NONE OF THEM DEALT
19 WITH MR. GROSS. SO HE'S ALSO JUST LOCAL COUNSEL IN THIS
20 MATTER, SO I WOULD LIKE HIM TO BE RELIEVED OF HIS
21 RESPONSIBILITIES AS BEING COUNSEL FOR SIX4THREE.

22 IT'S NOT GOING TO DELAY FACEBOOK. HE ONLY GOT
23 COPIED ON SOME OF THE EMAILS. HE'S NOT A BIG PLAYER AND
24 SHOULD BE RELIEVED. THANK YOU.

25 THE COURT: ALL RIGHT.

26 MR. MURPHY: NOT TO ARGUE, YOUR HONOR.

1 THE COURT: YES, SIR.

2 MR. MURPHY: ONE POINT OF CLARIFICATION. WITH
3 RESPECT TO THE NOTICE OF ERRATA DECLARATION FOR DAVID GODKIN.

4 THE COURT: YES.

5 MR. MURPHY: THE NOTICE OF ERRATA WAS JUST TO
6 INCLUDE THE EXHIBITS REFERENCED IN THE DECLARATION?

7 THE COURT: CORRECT, BECAUSE THEY WERE NOT INCLUDED.
8 THIS IS THE SEPTEMBER 21ST, 2018, DECLARATION.

9 MR. MURPHY: OKAY.

10 THE COURT: AS THE DECLARATION OF DAVID GODKIN IN
11 SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS.

12 MR. MURPHY: OKAY. SO THAT'S THE 9-21-18
13 DECLARATION?

14 THE COURT: THAT'S CORRECT.

15 MR. MURPHY: THANK YOU, YOUR HONOR.

16 THE COURT: VERY WELL. THAT'S GOT TO BE FILED
17 REGARDLESS OF WHAT THE COURT IS GOING TO DO. SUBMITTED,
18 COUNSEL?

19 MR. MURPHY: YES, YOUR HONOR.

20 MS. MEHTA: YES, YOUR HONOR.

21 MR. RUSSO: YOUR HONOR, I DID WANT TO SAY THERE IS
22 ONE CASE THAT HAS SOME SIMILARITY TO THIS CASE. IT'S A
23 FEDERAL CASE. I WAS TRYING TO PUT MY FINGER ON IT AS YOU
24 RAISED THE QUESTION. IT WAS DECIDED I BELIEVE IN THE SAN JOSE
25 DISTRICT COURT. I CAN TRY TO GET THAT CITATION FOR YOU.

26 I THOUGHT I HAD IT IN THIS BINDER AND I FLIPPED

1 THROUGH IT AND I DIDN'T FIND IT WHERE THE COURT HAD A
2 VIOLATION OF A STIPULATED PROTECTIVE ORDER. DOCUMENTS GOT
3 OUT. THEY WERE MADE PUBLIC. AND THE COURT WAS FACED WITH
4 WHAT DO WE DO NOW THAT THERE'S PUBLIC DOCUMENTS?

5 AND IN THAT CASE LIKE THIS ONE THE DOCUMENTS HAD A
6 CERTAIN PUBLIC INTEREST, WHICH OBVIOUSLY FACEBOOK DOESN'T
7 DISPUTE. THERE'S A PUBLIC INTEREST HERE. THE U.K. HAS
8 INVESTIGATED. A LOT OF THINGS HAVE HAPPENED.

9 I WOULD LIKE YOUR HONOR IN RE KOEHLER WHICH, YOU
10 KNOW, IS AT 181 CAL. APP. 4TH, 1153 FROM 2010. I'D LIKE YOU
11 TO GET THAT CASE. AND I CAN PUT MY FINGER ON IT MAYBE BY
12 BEFORE NOON AND GET IT FOR YOU.

13 THE COURT: WOULD YOU BE SO KIND TO FURNISH COPIES
14 TO EVERYONE?

15 MR. RUSSO: OF COURSE.

16 THE COURT: YES. THANK YOU.

17 MR. LERNER: YOUR HONOR, THIS IS AGAIN REPEATING
18 EXACTLY WHAT YOU HEARD BEFORE TO BE RESPECTFUL OF YOUR TIME.
19 IT'S THE SAME FEDERAL COURT OPINION. THE DECISION BY
20 JUDGE COUSINS. IT DOES INVOLVE DOCUMENTS. IT INVOLVES A
21 POLICE VIDEOTAPE. IT IS NOT LIKE THIS ONE. BUT INSOFAR AS IF
22 YOU DO REVIEW IT, YOU WILL FIND SIGNIFICANT SANCTIONS AGAINST
23 THE ATTORNEYS.

24 THE COURT: OKAY. VERY WELL. THANK YOU.
25 SUBMITTED, COUNSEL?

26 MR. LERNER: YES.

1 MR. MURPHY: YES.

2 THE COURT: THE COURT IS GOING TO VACATE ITS RULING.
3 I WILL CONSIDER THAT AN ADVISORY RULING WITH REGARD TO THE
4 DENIAL OF THE MOTION TO WITHDRAW AS COUNSEL OF RECORD. WHAT
5 THE COURT IS GOING TO DO IS TO REVIEW WHAT HAS BEEN DISCUSSED
6 TODAY. AND I WILL TAKE THIS MATTER UNDER SUBMISSION.

7 THE HEARINGS ON FRIDAY SHALL REMAIN ON CALENDAR
8 PENDING MY RULING WITH REGARD TO THE MOTIONS TO WITHDRAW TAKEN
9 UNDER SUBMISSION. MR. MURPHY.

10 MR. MURPHY: JUST A POINT OF CLARIFICATION. STILL
11 FILE THE DECLARATION?

12 THE COURT: ABSOLUTELY. NOTWITHSTANDING WHAT I DO
13 HERE TODAY, I DO WANT ALL THE EXHIBITS FILED TODAY
14 ELECTRONICALLY AND SERVED ON EVERYONE WITH A NOTICE OF ERRATA.

15 MR. MURPHY: THANK YOU. AND, SECONDLY, YOUR HONOR,
16 IF THE COURT IS INCLINED TO GO FORWARD ON FRIDAY AND THE
17 MOTION TO WITHDRAW IS DENIED, CAN MY CLIENT APPEAR
18 TELEPHONICALLY?

19 THE COURT: YES.

20 MR. MURPHY: THANK YOU.

21 MS. MEHTA: YOUR HONOR, AT THE RISK OF TESTING
22 YOUR PATIENCE, I JUST HAVE TO FOLLOW UP ON MR. FRISSORA AND
23 MR. DEHAYE. AGAIN, WE JUST DON'T KNOW WHAT'S GOING ON WITH
24 OUR DOCUMENTS THAT ARE OUT THERE. AND ALL WE'RE ASKING FOR IS
25 COMPLIANCE WITH THE PRIOR ORDER WITH RESPECT TO THOSE TWO
26 INDIVIDUALS.

1 THE COURT: ALL RIGHT. I WILL MAKE THAT ORDER. THE
2 ALLEGED EXPERTS MR. FRISSORA AND MR. DEHAYE SHALL FILE
3 DECLARATIONS WITH REGARD TO THE DOCUMENTS IN THIS CASE AS
4 ARTICULATED BY COUNSEL FOR FACEBOOK.

5 ALSO, MR. SCARAMELLINO SHOULD EXECUTE A DECLARATION
6 IN RELATION TO THAT PROTECTIVE ORDER AS WELL. SO THESE ARE
7 THE DECLARATIONS OR CERTIFICATIONS THAT ARE ATTACHED TO THE
8 2016 PROTECTIVE ORDER. OKAY.

9 DOES EVERYONE UNDERSTAND THAT? THAT IS SO
10 ORDERED. AND THAT WILL BE DEMANDED NOTWITHSTANDING WHAT I'M
11 DOING TODAY, SO I'M TAKING THIS MATTER OTHERWISE UNDER
12 SUBMISSION. THANK YOU VERY MUCH, EVERYONE. COURT IS IN
13 RECESS.

14 MS. MEHTA: THANK YOU, YOUR HONOR.

15 MR. MURPHY: THANK YOU, YOUR HONOR.

16 MR. RUSSO: YOUR HONOR, I DO HAVE THE CITATION FOR
17 YOU. THE HARMON CASE. IT'S HARMON V. CITY OF SANTA CLARA.
18 323 F.R.D. 617, NORTHERN DISTRICT OF CALIFORNIA, 2018. 323
19 F.R.D. 617.

20 THE COURT: THANK YOU.

21 MR. RUSSO: WE CAN GET YOU A COPY AND SEND IT TO
22 YOU, IF YOU'D LIKE.

23 THE COURT: VERY WELL. AND CERTAINLY COPY ALL
24 COUNSEL IN THE COURTROOM.

25 MR. RUSSO: YES, WE WILL. THANK YOU, YOUR
26 HONOR.

1 THE COURT: THANK YOU, MR. RUSSO. THANK YOU,
2 EVERYONE.

3 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

4 ---OOO---

1 STATE OF CALIFORNIA)

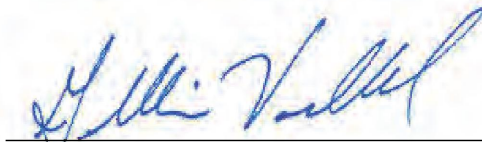
2) SS.

3 COUNTY OF SAN MATEO)

4 I, GERALDINE VANDEVELD, OFFICIAL COURT REPORTER,
5 COUNTY OF SAN MATEO, STATE OF CALIFORNIA, DO HEREBY CERTIFY:

6 THAT THE FOREGOING CONTAINS A TRUE, FULL AND CORRECT
7 TRANSCRIPT OF THE PROCEEDINGS GIVEN AND HAD IN THE
8 WITHIN-ENTITLED MATTER THAT WERE REPORTED BY ME AT THE TIME
9 AND PLACE MENTIONED AND THEREAFTER TRANSCRIBED BY ME OR AT MY
10 DIRECTION INTO LONGHAND TYPEWRITING AND THAT THE SAME IS A
11 CORRECT TRANSCRIPT OF THE PROCEEDINGS.

12 DATED: MARCH 14, 2019

13 

14
15 GERALDINE VANDEVELD, C.S.R. #8634
16 OFFICIAL COURT REPORTER
17
18
19
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EXHIBIT 5

1 IN THE SUPERIOR COURTS OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN MATEO

3 ---000---

4
5 SIX4THREE, LLC,

CERTIFIED TRANSCRIPT

6 PLAINTIFFS,

7 VS.

CASE NO. CIV533328

8 FACEBOOK, INC., ET AL.,

9 DEFENDANTS.

10 _____/

11
12 REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 BEFORE: HONORABLE V. RAYMOND SWOPE, JUDGE

14 DEPARTMENT 23

15 MARCH 15, 2019

16 A P P E A R A N C E S

17 FOR THE PLAINTIFFS:

18 STUART G. GROSS DAVID S. GODKIN (VIA COURTCALL)
ATTORNEY AT LAW ATTORNEY AT LAW

19 JAMES A. MURPHY
ATTORNEY AT LAW

20 FOR THE DEFENDANTS:

21 JOSH H. LERNER LAURA E. MILLER CATHERINE Y. KIM
ATTORNEY AT LAW ATTORNEY AT LAW ATTORNEY AT LAW

22 SONAL N. MEHTA NATALIE NAGLE ZACHARY ABRAHMSON
23 ATTORNEY AT LAW ATTORNEY AT LAW ATTORNEY AT LAW

24
25
26 REPORTED BY: GERALDINE VANDEVELD, C.S.R. 8634

P R O C E E D I N G S

REDWOOD CITY, CALIFORNIA

MARCH 15, 2019

--000--

THE COURT: GOOD MORNING, EVERYONE. CALLING CASE
NUMBER CIV533328. THIS IS THE MATTER OF SIX4THREE, LLC VERSUS
FACEBOOK, ET AL. WILL COUNSEL, PLEASE, STATE THEIR
APPEARANCES FOR THE RECORD.

MR. MURPHY: JAMES MURPHY ON BEHALF OF BIRNBAUM AND
GODKIN.

MR. SULLIVAN: GOOD MORNING, YOUR HONOR. DON
SULLIVAN FOR STUART GROSS OF GROSS AND KLEIN.

THE COURT: GOOD MORNING.

MR. RUSSO: GOOD MORNING, YOUR HONOR. JACK RUSSO
FOR THE INDIVIDUALS MR. SCARAMELLINO AND MR. KRAMER.

THE COURT: GOOD MORNING.

MS. MEHTA: GOOD MORNING, YOUR HONOR. SONAL MEHTA,
JOSH LERNER, LAURA MILLER, CATHERINE KIM AND ZACHARY ABRAHMSON
FROM DURIE TANGRI FOR FACEBOOK. AND WITH US IS NATALIE NAGLE
FROM FACEBOOK.

THE COURT: GOOD MORNING.

MR. MURPHY: YOUR HONOR, I BELIEVE MR. GODKIN IS
APPEARING VIA TELEPHONE.

THE COURT: MR. GODKIN.

1 MR. GODKIN: YES. GOOD MORNING, YOUR HONOR. THIS
2 IS DAVID GODKIN. I'M ON THE PHONE.

3 THE COURT: GOOD MORNING, MR. GODKIN. THANK YOU,
4 MR. MURPHY. WE HAVE THREE MATTERS ON CALENDAR TODAY. AND MY
5 UNDERSTANDING IS THE PARTIES HAVE SUBMITTED TO THE TENTATIVES
6 ON TWO OF THEM. THE FIRST IS THE MOTION FOR ATTORNEY'S FEES
7 AND COSTS AS TO THE INDIVIDUAL FACEBOOK DEFENDANTS AGAINST
8 SIX4THREE.

9 AND THEN SECOND THE MOTION FOR ATTORNEY'S FEES AND
10 COSTS WITH REGARD TO SIX4THREE AGAINST FACEBOOK, INC. AS EACH
11 OF THE PARTIES AND THE RESPECTIVE CASES AT LEAST THE MOVING
12 PARTY DEFENDANTS IN THE FIRST CASE IN THE FIRST MOTION AND THE
13 PLAINTIFFS IN THE SECOND PREVAIL.

14 WITH REGARD TO THE TENTATIVE RULING, I JUST HAVE TO
15 MAKE A FEW FINDINGS TO BE SAID IN ADDITION TO WHAT IS SET
16 FORTH IN THE TENTATIVE RULING. AN ATTORNEY FEE AWARD MUST NOT
17 ONLY BE JUST BUT REASONABLE. THE MAJOR FACTORS TO BE
18 CONSIDERED BY THE COURT ARE THE NATURE OF THE LITIGATION, ITS
19 DIFFICULTY, THE AMOUNT INVOLVED. THE SKILL REQUIRED AND THE
20 SKILL EMPLOYED IN HANDLING THE LITIGATION.

21 THE ATTENTION GIVEN, THE SUCCESS OF THE ATTORNEY'S
22 EFFORTS, THE ATTORNEY'S LEARNING, THE ATTORNEY'S AGE AND THE
23 ATTORNEY'S EXPERIENCE IN THE PARTICULAR TYPE OF WORK THAT'S
24 DEMANDED. THE INTRICACIES AND THE IMPORTANCE OF THE
25 LITIGATION AND THE NECESSITY FOR SKILLED LEGAL TRAINING AND
26 ABILITY IN TRYING THE CASE AND THE TIME CONSUMED.

1 IN THE PRESENT CASE, THE COURT FINDS THAT THIS IS A
2 CASE OF SIGNIFICANT COMPLEXITY. IT HAS BEEN VIGOROUSLY
3 LITIGATED AND COULD NOT HAVE BEEN COMPETENTLY PRESENTED
4 WITHOUT THE FULL PARTICIPATION OF THE SEVERAL LEGAL COUNSEL IN
5 THE CASE.

6 THIS COURT HAS MANY YEARS OF EXPERIENCE WITH
7 ATTORNEY'S FEES, FEE RATES, BILLING RATES IN THE BAY AREA
8 COMMUNITY AND IN THE SAN MATEO COUNTY AREA IN PARTICULAR. AND
9 PRELIMINARILY THE BILLING RATES OF \$620 PER HOUR BY A SENIOR
10 PRINCIPAL ATTORNEY AND BILLING RATE OF \$410 TO \$475 BY
11 ASSOCIATES ARE MODEST AND IN THE BALLPARK IN THE LEGAL
12 COMMUNITY. AND BECAUSE OF THE COMPLEXITY AND THE LITIGIOUS
13 NATURE OF THE CASE, THE COURT BELIEVED THAT THE FEES SET FORTH
14 IN THE TENTATIVE RULING WERE APPROPRIATE UNDER THE
15 CIRCUMSTANCES. BUT ANYTHING BEYOND THAT WAS EXCESSIVE.

16 AND ACCORDINGLY, THE COURT ADOPTS THE TENTATIVE
17 RULING WITH THOSE ADDITIONAL PROVISIONS THAT I CITED ON THE
18 RECORD. I'D ASK FOR THE PREVAILING PARTY TO PREPARE AN ORDER
19 CONSISTENT WITH THIS COURT'S RULING.

20 IN ADDITION TO THE ATTORNEY'S FEES MOTION THAT WE'RE
21 ON CALENDAR TODAY, THERE WAS ALSO A MOTION TO SEAL. THE COURT
22 ADOPTED ITS -- OR STATED THE TENTATIVE RULING GRANTING THE
23 MOTION TO SEAL. THERE WAS NO OPPOSITION TO THAT. AND THIS IS
24 THE MOTION TO SEAL BY FACEBOOK, INC. THAT WAS FILED ON
25 JANUARY 17TH, 2019. AND GOOD CAUSE APPEARING, THE COURT IS
26 ADOPTING THAT TENTATIVE RULING AS AN ORDER OF THE COURT.

1 SO ALL THE TENTATIVE RULINGS THAT ARE SUBSTANTIVE
2 ARE ADOPTED AS ORDERS OF THE COURT. I'M ALSO ASKING
3 FACEBOOK'S COUNSEL TO PREPARE THE ORDER AS THE PREVAILING
4 PARTY. ALL RIGHT.

5 NOW, THE NEXT MATTER IS A MATTER THAT REQUIRED THE
6 APPEARANCE FOR COUNSEL TODAY. AND THIS IS THE MOTION TO OPEN
7 DISCOVERY. AND GIVEN THAT FACEBOOK IS THE MOVING PARTY,
8 COUNSEL, YOU MAY PROCEED. WHO IS GOING TO BE MAKING THE
9 ARGUMENT?

10 MR. LERNER: THANK YOU, YOUR HONOR.

11 THE COURT: MR. LERNER. OKAY. VERY WELL.

12 MR. LERNER: GIVEN TO BE BLUNT THAT OVER THE LAST
13 COUPLE OF MONTHS THE COURT HAS DEMONSTRATED ON MANY OCCASIONS
14 AN EVEN BETTER COMMAND THAN COUNSEL OF SOME OF THE FACTS AND
15 THE LAW. I WANT TRY TO BE VERY QUICK AND NOT REPEAT A LOT OF
16 GROUND THAT HAS ALREADY BEEN COVERED.

17 WE ARE MOVING, AS YOUR HONOR KNOWS, UNDER THE
18 CRIME-FRAUD EXCEPTION AND YOUR HONOR HAS ASKED THE PARTIES TO
19 FOCUS ON THE ELEMENTS OF THAT EXCEPTION. I'LL DIRECT THE
20 COURT'S ATTENTION TO THE STATE FARM OPINION WHICH IS 54 CAL.
21 APP. 4TH AT 625. WHICH OBVIOUSLY TURNS ON THE BP DECISION
22 WHICH IS 199 CAL. APP. 3RD. LARGELY AT PAGE 1262. AND THE
23 STANDARD THERE AS WE DISCUSSED IS THERE IS NOT A PRIVILEGE
24 UNDER THE CODE FOR SERVICES THAT WERE SOUGHT OR OBTAINED TO
25 ENABLE OR AID ANYONE IN COMMITTING OR PLANNING TO COMMIT A
26 CRIME OR A FRAUD. AND THEN WITH RESPECT TO THE DOCUMENTS AT

1 ISSUE, THOSE DOCUMENTS MUST BEAR A REASONABLE RELATIONSHIP TO
2 THE FRAUD.

3 APPLYING THAT LAW TO THE FACTS HERE, WE THINK THAT
4 THE FACTS THAT WERE FOUND SUFFICIENT TO APPLY THE CRIME-FRAUD
5 EXCEPTION IN OTHER CASES INCLUDING THE STATE FARM CASE AND BP
6 ALASKA FAIL BY ANY MEASURE IN COMPARISON TO THE FACTS THAT
7 WE'VE GOT AT ISSUE HERE. AND THE STANDARD THAT WILL BE
8 APPLIED ON REVIEW IS WHETHER OR NOT THERE'S SUBSTANTIAL
9 EVIDENCE IN FAVOR OF YOUR HONOR'S FINDING NO MATTER HOW SLIGHT
10 IN COMPARISON TO THE CONTRADICTORY EVIDENCE.

11 WITH THAT STANDARD AGAIN AS I SAY IN THE CASE LAW AS
12 OUR BENCHMARK. WHAT YOU HAVE HERE WITHOUT REPEATING THE MANY
13 DOCUMENTS THAT THE COURT HAS ALREADY REVIEWED AND CITED IS A
14 COORDINATED EFFORT TO PUBLICIZE THESE DOCUMENTS. THERE'S NO
15 DISPUTE ABOUT THAT. IT IS IN THE DOCUMENTS STARTING AS EARLY
16 AS MARCH JUST TO GIVE, AGAIN, A VERY SMALL NUMBER. IF YOU
17 LOOK AT EXHIBIT 17 TO THE MILLER DECLARATION, YOU SEE COUNSEL
18 AND CLIENT WORKING HAND IN HAND OFTEN SENDING THE EXACT SAME
19 TEXT CUT AND PASTED INTO MEDIA ORGANIZATIONS TELLING THEM THAT
20 2,000 DOCUMENTS OR AS THE EMAILS PROCEED IN SOME INSTANCES
21 3,000 DOCUMENTS HAD BEEN ATTACHED TO THE DECLARATION ON THE
22 ANTI-SLAPP MOTION TO GIVE NOTICE THAT THIS ALL NEEDS TO BE
23 MADE PUBLIC.

24 EXHIBIT 18 THEN SHOWS THAT THEY DON'T WANT -- AND I
25 THINK THIS EMAIL IN SOME WAYS ENCAPSULATES THE ENTIRE ISSUE
26 HERE. IT'S MR. SCARAMELLINO TALKING TO ANOTHER PARTY. AND HE

1 SAYS IN EFFECT WE DON'T WANT THIS TO BE ABOUT THE CASE. WE
2 WANT THIS TO BE ABOUT PUBLICITY. HIS EXACT WORDS ARE WE DON'T
3 WANT THIS TO BE ABOUT THE BUSINESS OR THE APP BECAUSE
4 FACEBOOK'S CONDUCT HAS NOTHING TO DO WITH THE BUSINESS. HE'S
5 TALKING THERE ABOUT QUOTE "TED'S COMPANY OR THE APP." YOU
6 THEN SEE AS TIME MOVES ON MR. KRAMER INVITE A SUBPOENA FROM
7 THE U.K. AND WHILE COUNSEL HAS REPEATEDLY TOLD YOUR HONOR
8 THAT FACEBOOK WAS SOMEHOW TIMELY NOTIFIED OF THESE
9 DEVELOPMENTS, NOBODY HAS EVER TOLD YOU BECAUSE THEY CAN'T.
10 THAT WHEN MR. KRAMER INVITED A SUBPOENA TO BE SERVED ON HIM
11 THAT FACEBOOK WAS NOTIFIED. NOBODY HAS EVER TOLD YOU THAT HE
12 WARNED THE U.K. THAT IF A SUBPOENA WAS SERVED IN THE UNITED
13 STATES, WE OF COURSE WOULD GET NOTICE OF IT AND BE ABLE TO
14 PARTICIPATE.

15 NOBODY TOLD YOUR HONOR THAT THE RESPONSE THAT THEN
16 FOLLOWED WAS MR. KRAMER HERE'S A SUBPOENA FROM THE U.K., BUT
17 IT HAS NO EXTRATERRITORIAL EFFECT. WE DIDN'T GET ANY NOTICE
18 OF THAT. WE DIDN'T GET THE CHANCE TO RESPOND. INSTEAD AS
19 YOUR HONOR WELL KNOWS NOBODY IS NOTIFIED UNTIL SHORTLY BEFORE
20 THANKSGIVING. YOUR HONOR THEN ISSUES AN ORDER THAT SAYS, "DO
21 NOT VIOLATE THE PROTECTIVE ORDER IN NO UNCERTAIN TERMS." AND
22 WE LEARN ABOUT IT ESSENTIALLY WHEN THE COURT IS DARK FOR THE
23 HOLIDAY.

24 THAT IS IN A NUTSHELL THE SEQUENCE OF EVENTS THAT I
25 THINK, AGAIN, SHOWS A MUCH GREATER, LONGER STANDING AND MORE
26 DETAILED VIOLATION OF THE COURT'S ORDER AND FAILURE OBVIOUSLY

1 TO KEEP THE COURT AND US ABREAST OF WHAT WAS GOING ON.

2 NOW MORE PROBLEMATICALLY IT HASN'T STOPPED. THE
3 DECLARATIONS THAT YOU HAVE CONTINUED TO RECEIVE AND THE
4 ARGUMENTS THAT YOU HAVE CONTINUED TO HEAR CONTINUE TO SHOW
5 CONFLAGRANT DISREGARD FOR THESE ORDERS. YOU HEARD THAT
6 MR. KRAMER WAS QUOTE "SURPRISED" BY WHAT HAPPENED. WELL, NOW
7 WE SEE AS YOU INDICATED AND I WILL KEEP IT VERY SHORT THAT
8 MR. KRAMER SAID IN A DECLARATION ON THIS POINT "I NEVER
9 ACCESSED THE DROPBOX." WE NOW KNOW THAT, IN FACT, HE WENT TO
10 CHANGE THE PASSWORD FOR THAT THE DAY BEFORE THESE DOCUMENTS
11 WERE DISCLOSED.

12 THE DOCUMENTS THAT WE ARE SEEKING AND THE
13 DEPOSITIONS THAT WE HAVE REQUESTED ARE NOT SOMEWHAT RELATED TO
14 OR SLIGHTLY OVERLAPPING WITH THE FRAUD HERE. THERE IS A
15 PERFECT OVERLAP. WE ARE LOOKING FOR THE DOCUMENTS AND THE
16 TESTIMONY THAT RELATE TO THE SHARING OF OUR INFORMATION IN
17 VIOLATION OF MULTIPLE COURT ORDERS.

18 WITH RESPECT TO THE RELIEF AND HOW IT WOULD BE
19 CRAFTED, WE OBVIOUSLY SUBMITTED A PROPOSED ORDER. I THINK
20 IT'S IMPORTANT TO NOTE THAT THE PROPOSED ORDER AND THE
21 DISCOVERY SOUGHT THERE, AGAIN, IS LARGELY FOCUSED AND THIS IS
22 INTENTIONALLY SO ON ISSUES THAT DON'T EVEN AS A THRESHOLD
23 MATTER REQUIRE GETTING TO THIS CRIME-FRAUD EXCEPTION.

24 THE LAST ONE WHICH IS NARROWLY TAILORED DOES REQUIRE
25 THE APPLICATION, WHICH WE OBVIOUSLY THINK IS MET HERE. BUT WE
26 HAVE BEEN DELAYED TO USE THE WORDS OF THE OPINION IN APPLE

1 SAMSUNG IN THE BASIC PROCESS OF JUST GETTING TO THE BOTTOM OF
2 THIS. AND THE COURT CAN'T EITHER. AND WE REALLY ARE FOCUSED
3 ON AND NEED TO FIND OUT WHY IT IS THAT THESE DOCUMENTS KEEP
4 SHOWING UP, KEEP BEING SPREAD AROUND ON VARIOUS WEBSITES AND
5 OTHER PLACES. AND NOBODY CAN ANSWER YOUR HONOR'S QUESTIONS
6 ABOUT WHY IT IS THEY WERE SHARED WITH MR. KRAMER IN THE WAY
7 THEY WERE. AND WHO THEY HAD SINCE BEEN DISTRIBUTED TO. AND
8 ALL OF US NEED AN ANSWER TO THAT QUESTION.

9 SO WITH THAT GIVEN THE POINT I STARTED WITH THAT I
10 WANT TO TRY AND KEEP IT CONCISE, I WILL STOP AND OBVIOUSLY
11 ANSWER ANY QUESTIONS THAT THE COURT HAS.

12 THE COURT: THANK YOU, MR. LERNER.

13 MR. LERNER: THANK YOU.

14 THE COURT: I WILL RESERVE MY QUESTIONS FOR LATER.
15 MR. GODKIN.

16 MR. MURPHY: I WILL SPEAK ON BEHALF OF MR. GODKIN,
17 YOUR HONOR.

18 THE COURT: MR. MURPHY, RIGHT NOW THERE'S STILL A
19 RELATIONSHIP BETWEEN MR. GODKIN AND MR. GROSS AND SIX4THREE.
20 AND NO ONE HAS SUBSTITUTED IN AS COUNSEL OF RECORD TO SPEAK ON
21 BEHALF OF THESE COUNSEL IN RELATION TO SIX4THREE. UNLESS
22 THERE'S SOME EXCEPTION THAT YOU CAN ARTICULATE ON THE RECORD
23 FOR ME, MR. MURPHY.

24 MR. MURPHY: NO, THERE IS NOT, YOUR HONOR. AND I
25 THINK THIS MOTION -- I THINK THIS MOTION IS A PERFECT EXAMPLE
26 OF WHAT WE WERE ARGUING WITH RESPECT TO OUR MOTION TO

1 WITHDRAW. THIS POINTS TO THE VERY CONFLICT THAT PREVENTS MY
2 CLIENT FROM ADVISING SIX4THREE WITH RESPECT TO THE ISSUES THAT
3 ARE RAISED IN THE MOTION.

4 AND I WAS UNDER THE IMPRESSION THE COURT WAS GOING
5 TO RULE ON THE MOTION TO WITHDRAW. I'M PREPARED TO ADDRESS
6 THE MOTION SEEKING TO COMPEL DISCOVERY, BUT WE STILL HAVE THAT
7 ISSUE OUT THERE. MR. GODKIN CANNOT ADVISE SIX4THREE WITH
8 RESPECT TO THESE MATTERS.

9 MS. MEHTA: YOUR HONOR, ON THAT POINT, WE WENT OVER
10 THIS ON WEDNESDAY. THE RULE IS QUITE CLEAR. THE COMMENTS TO
11 RULE 1.16 THAT UNLESS MR. GODKIN HAS GIVEN -- BEEN GIVEN
12 PERMISSION BY THE COURT TO WITHDRAW, HE IS DUTY-BOUND TO
13 CONTINUE TO REPRESENT HIS CLIENT. THE COURT HAS NOT GRANTED
14 LEAVE TO WITHDRAW AND THAT DUTY TO REPRESENT HIS CLIENT EXISTS
15 EVEN IF THE WITHDRAWAL IS SOUGHT FOR THE CONFLICT.

16 WHAT THE RULE SAYS IS IF A TRIBUNAL DENIES LAWYER
17 PERMISSION TO WITHDRAW, THE LAWYER IS OBLIGATED TO COMPLY WITH
18 THE TRIBUNAL'S ORDER. THIS DUTY APPLIES EVEN IF THE LAWYER
19 SOUGHT PERMISSION TO WITHDRAW BECAUSE OF A CONFLICT OF
20 INTEREST.

21 MR. GODKIN WAS DUTY-BOUND TO OPPOSE THE MOTION.
22 THEY WROTE A BRIEF. THEY FILED AN OPPOSITION. HE IS
23 DUTY-BOUND TO ARGUE THAT MOTION ON BEHALF OF SIX4THREE, UNLESS
24 THEY ARE WAIVING ORAL ARGUMENT.

25 MR. MURPHY: WELL, I DISAGREE WITH THAT ASSESSMENT.
26 BUT THAT REALLY ISN'T THE PURPOSE OF MY RESPONDING TO

1 MR. LERNER'S STATEMENT. I'M MORE THAN HAPPY TO ADDRESS
2 COUNSEL'S ARGUMENT AT THE APPROPRIATE TIME AND WHEN THE COURT
3 WANTS TO TAKE FURTHER ARGUMENT ON THE MOTION TO WITHDRAW.

4 BUT MY CLIENT UNDERSTANDS HIS DUTIES TO HIS CLIENT,
5 BUT THERE IS AN INHERENT CONFLICT THAT PREVENTS ADVICE BEING
6 GIVEN. IT'S JUST THERE. IT CAN'T BE IGNORED. YOUR HONOR,
7 WOULD YOU LIKE ME TO ADDRESS AT LEAST AS TO MY CLIENT THIS
8 MOTION FOR DISCOVERY?

9 THE COURT: I WANT TO SAY, FIRST OF ALL, BEFORE I
10 ALLOW YOU TO DO THAT, MR. MURPHY AND MS. MEHTA, WE DO NOT HAVE
11 THE PENDING MOTION FOR WITHDRAWAL OF COUNSEL IN THIS COURT
12 TODAY. THE COURT HAS TAKEN THAT MATTER UNDER SUBMISSION, SO I
13 WILL NOT ENTERTAIN ANY ARGUMENTS IN THAT REGARD.

14 SECOND, I WANT TO POINT OUT THAT NOTWITHSTANDING THE
15 ISSUE RELATED TO THE CONFLICT, I DO HAVE TO COMMENT ON SOME
16 THINGS THAT HAVE TRANSPIRED THAT FEED INTO MS. MEHTA'S
17 OBSERVATIONS.

18 MR. GODKIN AND MR. GROSS HAVE FILED PAPERS SINCE THE
19 IDENTIFICATION OF THEIR CONFLICT WITH THE PRINCIPAL FOR
20 SIX4THREE AND ESSENTIALLY BY EXTENSION SIX4THREE AND HAVE
21 CONTINUED TO LITIGATE AND FILED BRIEFS AFTER THAT FACT. SO
22 THAT IN SOME WAYS BELIES THE POSITION THAT COUNSEL HAVE NOW
23 TAKEN IN RELATION TO WITHDRAWING FROM THE CASE AND THE
24 CONFLICT ISSUE.

25 MR. MURPHY: I DISAGREE WITH ALL DUE RESPECT, YOUR
26 HONOR, AS MS. MEHTA POINTS OUT THERE IS STILL A DUTY TO

1 REPRESENT THE INTEREST OF THE CLIENT. THAT DOESN'T ADDRESS
2 THE CONFLICT THAT PREVENTS THE LAWYER FROM ADVISING THE
3 CLIENT. AND, YES, THERE WAS AN OPPOSITION FILED TO THIS
4 MOTION ON BEHALF OF SIX4THREE BY MR. GODKIN'S FIRM AND
5 MR. GROSS'S FIRM.

6 AND TO THE EXTENT THERE IS THAT OPPOSITION THERE AND
7 MR. GODKIN WISHES TO ADDRESS THE MOTION AS TO SIX4THREE, I'M
8 HERE TO ADDRESS THE MOTION AS TO BIRNBAUM AND GODKIN. AND TO
9 THE EXTENT THAT IT SPILLS OVER FOR THE BENEFIT OF SIX4THREE SO
10 BE IT, BUT I'M HERE TO ADDRESS THE MOTION AS IT DIRECTLY
11 PERTAINS TO BIRNBAUM AND GODKIN AND ATTENDED TO THAT WOULD BE
12 AS IT IMPACTS SIX4THREE.

13 THE COURT: THANK YOU, MR. MURPHY.

14 MS. MEHTA: AS LONG AS WE'RE GOING TO HAVE ARGUMENT
15 ON BEHALF OF THE PEOPLE THAT ARE -- BY THE MOTION FOR
16 SIX4THREE BY MR. GODKIN AND MR. GROSS AND TO THE EXTENT IT
17 IMPACTS THEM IN THEIR PERSONAL CAPACITY FROM THEIR PERSONAL
18 COUNSEL, I THINK WE'RE ALL SET. LET'S PROCEED.

19 THE COURT: ALL RIGHT. THAT IS THE COURT'S RULING.
20 AND, MR. MURPHY, YOU MAY PROCEED.

21 MR. MURPHY: THANK YOU, YOUR HONOR. AND I WOULD
22 STAND ON THE OPPOSITION THAT WAS FILED ON BEHALF OF BIRNBAUM
23 AND GODKIN NOT ONLY FOR THE FIRM ITSELF BUT ALSO FOR
24 SIX4THREE. THERE IS AN OPPOSITION. MR. GODKIN CAN ADDRESS
25 THE COURT IF HE SO CHOOSES, BUT THE OPPOSITION IS STILL
26 PRESENT AND SHOULD BE CONSIDERED BY THE COURT.

1 THE PROBLEM I HAVE WITH COUNSEL'S ARGUMENT IS THAT
2 IT IGNORES THE BEDROCK OF ANGLO-AMERICAN JURISPRUDENCE. THE
3 BEDROCK OF ANGLO-AMERICAN JURISPRUDENCE IS THE ATTORNEY-CLIENT
4 PRIVILEGE WHICH EXTENDS FROM THE MOMENT A LAWYER IS CONSULTED
5 BY A CLIENT OR POTENTIAL CLIENT TO THE POINT IN TIME WHERE
6 EVEN AFTER THE RELATIONSHIP IS OVER, THE LAWYER IS DUTY-BOUND
7 TO HONOR THE ATTORNEY-CLIENT PRIVILEGE.

8 NOW, THERE IS AN EXCEPTION THE CRIME-FRAUD
9 EXCEPTION. IT'S A VERY NARROW EXCEPTION. THE LAWYER HAS TO
10 BE CONSULTED BY THE CLIENT FOR THE PURPOSE OF ADVISING THE
11 CLIENT WITH RESPECT TO THE COMMISSION OF A CRIME OR A FRAUD.

12 NOW, WE HAVE A VERY FINE LINE AS TO WHAT THE LAWYERS
13 ADVICE IS AND WHETHER THE EXCEPTION APPLIES. YOU COULD TAKE
14 ONE END OF THE SPECTRUM AND SAY, OKAY, BERNIE MADOFF CONSULTS
15 ME FOR THE PURPOSE OF RUNNING A PONZI SCHEME TO ADVISE HIM HOW
16 ON HOW TO RUN A PONZI SCHEME. CLEARLY THE CRIME-FRAUD
17 EXCEPTION APPLIES THERE. BUT WHEN BERNIE MADOFF COMES IN TO
18 THE LAWYER AND SAYS, GEE, YOU KNOW. I'VE DONE THESE THINGS.
19 PROTECT ME UNDER THE LAW. AND YOU DEVICE A LEGAL THEORY TO
20 PROTECT THE CLIENT. THE CLIENT CRIME-FRAUD EXCEPTION DOES NOT
21 APPLY. IT HAS TO BE FOR THE COMMISSION OF A CRIME OR FRAUD.

22 THE COURT: MR. MURPHY, THERE ARE -- I'M SURE THAT
23 YOU'VE READ ALL THE PAPERS --

24 MR. MURPHY: I HAVE.

25 THE COURT: -- INVOLVED IN THIS CASE. THERE ARE
26 CITATIONS TO CERTAIN EMAILS THAT WERE AUTHORED BY YOUR CLIENT.

1 AND THOSE EMAILS WERE PARROTED BY OTHERS BY
2 MR. SCARAMELLINO AND BY MR. KRAMER IN TERMS OF THE ESSENTIAL
3 FINDINGS THAT WERE MADE AFTER HAVING REVIEWED THE CONFIDENTIAL
4 INFORMATION THAT IS AT ISSUE TODAY. AND THERE IS A COMMENT
5 ALSO THAT THERE HAS TO BE SOME MECHANISM TO BE ABLE TO GET
6 THAT INFORMATION OUT TO THE PUBLIC OR VARIATIONS ON THAT
7 THEME. AND THOSE PORTIONS OF THE EMAILS WERE CUT AND PASTED
8 FROM THE INITIAL EMAIL BY MR. GODKIN.

9 SO THERE IS DISCUSSION ABOUT THE ESSENCE OF THE
10 CONFIDENTIAL INFORMATION THAT IS PROTECTED BY THE STIPULATED
11 PROTECTIVE ORDER AND THAT FURTHER CONVERSATION HAS BEEN ECHOED
12 BY THE PRINCIPALS OF SIX4THREE MEANING MR. KRAMER AND ALSO BY
13 MR. SCARAMELLINO. HOW IS THE REPRESENTATION THAT MR. GODKIN
14 HAD MADE WITH REGARD TO COMMENTARY ON THE CONFIDENTIAL
15 INFORMATION TO OTHERS ANY DIFFERENT THAN THE REPRESENTATIONS
16 OF THAT INFORMATION COMING FROM THE PRINCIPAL FOR SIX4THREE
17 AND MR. SCARAMELLINO WHO IS A MEMBER OF THE LEGAL TEAM AS WELL
18 AS AN INVESTOR?

19 MR. MURPHY: AS POINTED OUT IN THE OPPOSITION, YOUR
20 HONOR, MANY OF THESE EMAILS COMMENTS RELATE TO MATTERS THAT
21 WERE OF PUBLIC RECORD. SPECIFICALLY THE 5TH AMENDED COMPLAINT
22 AND THE ALLEGATIONS CONTAINED IN THAT 5TH AMENDED COMPLAINT.
23 CLEARLY A PUBLIC RECORD. CERTAINLY NOT ANY OF THE
24 DOCUMENTATION COVERED BY STIPULATED PROTECTIVE ORDER.

25 SO WHEN THERE IS -- AND THAT RAISES ALSO KIND OF A
26 FIRST AMENDMENT ISSUE ALSO. AND I'M NOT TALKING ABOUT THE

1 DISCLOSURE OF CONFIDENTIAL OR HIGHLY CONFIDENTIAL INFORMATION.
2 I'M TALKING ABOUT THE USE OF THE FIRST AMENDMENT IN EXPRESSING
3 FREEDOM OF SPEECH AND TO WHAT EXTENT IS A LAWYER OR A CLIENT
4 PROHIBITED FROM DISCUSSING A CASE AND THE ALLEGATIONS OF THE
5 CASE WITHOUT THERE BEING SOME TYPE OF AN ORDER, A GAG ORDER
6 FROM THE COURT.

7 THE COURT: WHICH ESSENTIALLY THERE IS. THERE WAS A
8 STIPULATED PROTECTIVE ORDER AGREED UPON BY THE PARTIES AND
9 SIGNED BY THIS COURT AS AN ORDER OF THE COURT. AND THERE'S A
10 PASSAGE WITHIN THAT STIPULATED PROTECTIVE ORDER THAT TALKS
11 ESSENTIALLY ABOUT THE COMMENTARY ON ANY OF THE EVIDENCE THAT'S
12 SET FORTH PROTECTED BY THIS STIPULATED PROTECTIVE ORDER.

13 MR. MURPHY: UNDERSTOOD, YOUR HONOR. AND I AGREE
14 WITH YOU AS TO THE DISCLOSURE OF HIGHLY CONFIDENTIAL OR
15 CONFIDENTIAL DOCUMENTATION. BUT WHAT WE'RE TALKING ABOUT IS A
16 DISCLOSURE OF A THEORY. THE ALLEGATIONS OF A COMPLAINT WHICH
17 IS A MATTER OF PUBLIC RECORD. AND WHAT COUNSEL AND WHAT
18 FACEBOOK IS ATTEMPTING TO DO IS SHOW ME FREE EXERCISE OF
19 SPEECH. IF A LAWYER OR A CLIENT IS UNABLE TO GO TO THE PRESS
20 AND DISCUSS WITH THE PRESS THE ALLEGATIONS OF A MATTER THAT IS
21 OF SIGNIFICANT PUBLIC INTEREST, THAT IS THE TYPE OF GAG ORDER
22 I'M TALKING ABOUT.

23 THERE IS NO PROHIBITION OF THE LAWYER OR THE
24 LAWYER'S CLIENT FROM DISCUSSING THE CASE. THE MERITS OF THE
25 CASE. THE ALLEGATIONS OF THE CASE. BUT CANNOT DISCLOSE THE
26 HIGHLY CONFIDENTIAL OR CONFIDENTIAL DOCUMENTATION.

1 AND IN OUR OPPOSITION TO THEIR MOTION, WE POINT OUT
2 THAT MUCH OF WHAT THEY COMPLAIN ABOUT WHAT THEY SPIN IN THEIR
3 ARGUMENT ARE MATTERS OF PUBLIC RECORD. DISCLOSURES OF
4 INFORMATION CONTAINED IN THE 5TH AMENDED COMPLAINT. IF
5 COUNSEL FELT THAT THE 5TH AMENDED COMPLAINT SOMEHOW VIOLATED
6 THE COURT'S ORDER WITH RESPECT TO DISCLOSURE OF CONFIDENTIAL
7 AND HIGHLY CONFIDENTIAL INFORMATION, FACEBOOK COULD HAVE AND
8 FRANKLY GIVEN THE AGGRESSIVE NATURE OF THEIR LITIGATION
9 TACTICS WOULD HAVE FILED A MOTION TO STRIKE THAT OR SEAL IT OR
10 DO SOMETHING THAT WOULD SUGGEST THAT. THIS INFORMATION THAT
11 IS NOW IN THE PUBLIC DOMAIN SHOULD NOT BE THERE, BUT THEY
12 DIDN'T.

13 SO THE DISCLOSURES THAT WERE MADE BY MY CLIENT AND I
14 BELIEVE MR. RUSSO PROBABLY WILL MAKE THE SAME ARGUMENT, THOSE
15 DISCLOSURES WERE MATTERS OF PUBLIC RECORD. AND IF YOU'RE
16 INDUCING SOMEONE OF TRYING TO SOLICIT SUPPORT FROM THE MEDIA
17 OR OTHER FOLKS USING YOUR FIRST AMENDMENT RIGHT OF FREE
18 SPEECH, WHAT COUNSEL IS ATTEMPTING TO DO IS FORWARD THAT TO
19 CHILL THE VALID EXERCISE OF FREE SPEECH. AND THAT'S WHAT WE
20 POINT OUT. AND I HOPE I ADDRESSED THE QUESTION RAISED BY THE
21 COURT. BUT IF NOT, IF YOU WANT FURTHER INFORMATION FROM ME,
22 I'M MORE THAN HAPPY TO REPLY.

23 THE COURT: THANK YOU, MR. MURPHY. THE QUESTION
24 THAT THE COURT HAD WAS THE LANGUAGE USED BY MR. GODKIN WHICH
25 WAS ALL PARROTED BY THE OTHERS MR. KRAMER AND MR. SCARAMELLINO
26 REGARDING A MECHANISM FOR GETTING THIS INFORMATION OUT. THERE

1 IS DISCUSSION ABOUT THE 5TH AMENDED COMPLAINT IN THE ABSTRACT.
2 EVERY ATTORNEY IS CERTAINLY ALLOWED AND FREE TO UNDER THE
3 FIRST AMENDMENT DISCUSS THEIR CASE. THEY MAY DISCUSS THE
4 ALLEGATIONS OF THE COMPLAINT AND THEIR THEORIES REGARDING THE
5 ALLEGATIONS OF THE COMPLAINT.

6 I WHOLLY AGREE WITH YOU, MR. MURPHY. THE PROBLEM I
7 HAVE THOUGH IS THE CHARACTERIZATION OF DIFFERENT FACTS OUTSIDE
8 OF THE FOUR CORNERS OF THE ALLEGATIONS OF THE COMPLAINT WITH
9 THEORIES THAT ARE BROADER THAN THE LAWSUIT. THAT IS TO SAY IF
10 THE PURPOSE OF THE LAWSUIT IS TO SEEK RELIEF AND SEEK
11 RECOMPENSE AS A RESULT OF THE WRONGDOINGS OF FACEBOOK AGAINST
12 SIX4THREE, THEN THE DISCUSSION SHOULD BE CONFINED TO THE FOUR
13 CORNERS OF THOSE ALLEGATIONS. WOULDN'T YOU AGREE, MR. MURPHY?

14 MR. MURPHY: I WOULD AGREE WITH THAT, YOUR HONOR.

15 THE COURT: HOWEVER, ONCE SOMEONE GOES OUTSIDE OF
16 THE SCOPE LOOKING AT THE BROADER APPLICATION OF CERTAIN FACTS
17 THAT ARE OUTSIDE OF THE FOUR CORNERS OF THE COMPLAINT AND IN
18 ADDITION WHICH TO FIND A MECHANISM TO DISCLOSE THAT
19 INFORMATION, WE HAVE A DIFFERENT SET OF CIRCUMSTANCES THAT ARE
20 SOMEWHAT OF A DEPARTURE FROM THE PRESENTATION THAT YOU'VE MADE
21 TO THE COURT TODAY.

22 MR. MURPHY: WELL, I'M NOT SO SURE IT WOULD BE A
23 DEPARTURE, YOUR HONOR, BECAUSE IF THE LAWYER -- LET ME JUST
24 TALK IN THE ABSTRACT. IF THE LAWYER IS CONSULTED BY A CLIENT
25 WHO HAS ALREADY ENGAGED IN SOME ACTIVITY AND SEEKS TO FIND OUT
26 FROM THE LAWYER WHAT THAT PERSON CAN DO PURSUANT TO HIS OR HER

1 LEGAL RIGHTS, THE ADVICE THE LAWYER WOULD BE GIVING WOULD NOT
2 BE SUBJECT TO THE CRIME-FRAUD EXCEPTION. THE LAWYER IS
3 ADVISING THE CLIENT ON WHAT THE CLIENT'S RIGHTS OR OBLIGATIONS
4 WOULD BE.

5 NOW, THERE MAY BE A MECHANISM THERE AND HERE FOR
6 DISCLOSURE OF INFORMATION THAT DOES NOT RUN AFOUL OF THE
7 COURT'S ORDER. BUT MERELY BY CONSULTING WITH THE LAWYER IN
8 LOOKING INTO THOSE POSSIBILITIES DOES NOT IN AND OF ITSELF
9 CONSTITUTE AIDING AND ABETTING OR CONSPIRACY TO COMMIT A CRIME
10 OR A FRAUD.

11 SO THAT'S WHEN I TALK ABOUT THE FINE LINE. WHEN A
12 CLIENT GOES TO THE LAWYER AND SEEKS LEGAL ADVICE AND IF A
13 CRIME HAS ALREADY BEEN COMMITTED OR A FRAUD HAS ALREADY BEEN
14 COMMITTED OR EVEN CONTEMPLATED AND THE LAWYER GIVES ADVICE TO
15 THE CLIENT NOT TO AID IN THE COMMISSION OF THAT CRIME OR
16 FRAUD, THAT IS NOT COVERED -- THAT'S NOT AN EXCEPTION TO THE
17 ATTORNEY-CLIENT CONFIDENTIAL OBLIGATIONS.

18 AND REMEMBER THAT -- WHAT DOES THE BUSINESS AND
19 PROFESSIONS CODE SAY? A LAWYER AT HIS OR HER PERIL MUST KEEP
20 INVIOLEATE THE CONFIDENCES OF A CLIENT. THAT'S HOW IMPORTANT
21 THE ATTORNEY-CLIENT PRIVILEGE IS. AND THAT'S WHY AN EXCEPTION
22 SUCH AS THE CRIME-FRAUD EXCEPTION HAS TO BE CONSTRUED SO
23 NARROWLY.

24 AND HERE FACEBOOK HAS NOT ESTABLISHED THE PRIMA
25 FACIE BASIS FOR THE APPLICATION OF THE CRIME-FRAUD EXCEPTION.
26 IT JUST HASN'T. AND UNLESS THE COURT HAS ANY FURTHER

1 QUESTIONS OF ME, I'LL SUBMIT ON THE PAPERS AND ON MY ARGUMENT
2 ON BEHALF OF MY CLIENT.

3 I SHOULDN'T SAY THAT. YOU KNOW, I ALWAYS THINK OF
4 SOMETHING ADDITIONAL. BUT IN THIS PARTICULAR CASE AT LEAST
5 WITH RESPECT TO THE DISCOVERY REQUEST AND WE POINTED OUT
6 PROCEDURALLY WE BELIEVE THE MOTION IS DEFECTIVE. BUT AT LEAST
7 AS TO MY CLIENT. IT PROBABLY IS AS TO MR. GROSS AS WELL.

8 THERE HASN'T BEEN A SUFFICIENT SHOWING THAT EXIGENT
9 CIRCUMSTANCES THAT WOULD ALLOW DISCOVERY AGAINST THE LAWYERS.
10 I MEAN THIS IS HIGHLY UNUSUAL FOR ADVERSARY TO SEEK DISCOVERY
11 AGAINST THAT ADVERSARY'S COUNSEL. AND HERE THERE IS -- IF THE
12 COURT IS INCLINED TO ALLOW DISCOVERY, THERE ARE OTHER
13 MECHANISMS AVAILABLE TO FACEBOOK TO PURSUE DISCOVERY WITHOUT
14 TAKING DEPOSITIONS OF MR. BIRNBAUM AND MR. GROSS.

15 AND UNTIL THEY ARE ABLE TO ESTABLISH. AND I MEAN
16 ESTABLISH BY FACTS NOT BY INNUENDO NOT BY ARGUMENT NOT BY
17 TRYING TO SPIN CERTAIN THINGS THAT THE CRIME-FRAUD EXCEPTION
18 ACTUALLY APPLIES. THE DEPOSITIONS OF MR. GODKIN AND MR. GROSS
19 SHOULD NOT GO FORWARD. AS IT STANDS RIGHT NOW, MY CLIENT IS
20 STILL COUNSEL OF RECORD FOR SIX4THREE.

21 NOW, IF MY CLIENT WERE NO LONGER COUNSEL FOR
22 SIX4THREE, THERE WOULD BE A DIFFERENT ANALYSIS AND A DIFFERENT
23 ARGUMENT. BUT RIGHT NOW, YOU KNOW, UNDER STATE FARM AND THE
24 EXIGENT CIRCUMSTANCES JUSTIFYING DISCOVERY AGAINST THE
25 ADVERSARY'S LAWYER HAS NOT BEEN ESTABLISHED. THANK YOU, YOUR
26 HONOR.

1 THE COURT: THANK YOU, MR. MURPHY. IN OTHER WORDS,
2 THE LAWYERS WERE MERELY REPRESENTING AND ADVISING THEIR CLIENT
3 DURING THE COURSE OF THE LITIGATION UP TO THE TIME THAT THE
4 DISCLOSURE OF THE CONFIDENTIAL INFORMATION WAS TAKING PLACE.
5 THE LAWYER MEANING MR. GODKIN AND BY EXTENSION MR. GROSS WERE
6 MERELY REPRESENTING AND ADVISING THEIR CLIENT AND ALSO MAKING
7 REPRESENTATIONS OF WHAT THEIR CASE WAS ABOUT TO THE PRESS.
8 THAT'S ESSENTIALLY WHAT YOU'RE SAYING.

9 MR. MURPHY: OUR PAPERS SET THAT FORTH, YOUR HONOR.

10 THE COURT: YES.

11 MR. MURPHY: LAWYERS ADVISE CLIENTS. THEY COUNSEL
12 CLIENTS. THAT'S WHAT WE DO EVERY DAY. YOU KNOW, WE DON'T GET
13 INVOLVED IN HEAVY LIFTING. WE TRY TO SOLVE PROBLEMS THE
14 CLIENTS HAVE. SO WHEN A LAWYER IS CONSULTED BY A CLIENT TO
15 GIVE THE CLIENT ADVICE AND THAT IS A SANCTIFIED RELATIONSHIP
16 SUCH THAT PRIVILEGES ATTACH. I CAN'T GO HOME AT NIGHT AND
17 DISCUSS MY CASES WITH MY WIFE. AT LEAST THE CONFIDENTIAL
18 COMMUNICATIONS BECAUSE THERE'S A SEPARATE PRIVILEGE AFFORDED
19 TO MY CLIENT.

20 SO WHAT WE DO IS WE GIVE ADVICE. AND ALL OF THAT
21 ADVICE IS PROTECTED EXCEPT FOR VERY LIMITED SPECIFIED REASONS.
22 AND ONE OF THOSE VERY LIMITED SPECIFIED REASON IS THE
23 CRIME-FRAUD EXCEPTION. WHEN A LAWYER IS CONSULTED FOR THE
24 PURPOSE OF ADVISING A CLIENT ON HOW TO COMMIT A CRIME OR A
25 FRAUD, THE ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY. AND WE
26 DON'T HAVE THAT SITUATION HERE. THAT WAS MY POINT, YOUR

1 HONOR.

2 THE COURT: AND YOUR POSITION IS THAT THE DEFENDANTS
3 HAVE NOT MADE A PRIMA FACIE CASE OF THAT SHOWING?

4 MR. MURPHY: THAT'S CORRECT.

5 THE COURT: MR. SULLIVAN.

6 MR. SULLIVAN: YOUR HONOR, I WOULD JUST REPRESENT
7 THAT MR. GROSS IS ONLY A LOCAL COUNSEL IN THIS MEETING. HE
8 WAS NOT THERE AND CERTAINLY THERE HAS BEEN NO EVIDENCE THAT HE
9 EVER ADVISED OR COUNSELED ANY OF THE PRINCIPALS IN THIS MATTER
10 REGARDING VIOLATING THE PROTECTIVE ORDER. THERE'S JUST NOT
11 THAT EVIDENCE HERE. AND WITH RESPECT TO PRIVILEGE TO GET
12 DISCOVERY AGAINST AN ATTORNEY, FACEBOOK WOULD HAVE TO SHOW
13 THAT IS THE ONLY POSSIBLE SOURCE OF THAT INFORMATION AND AGAIN
14 THAT HASN'T BEEN SHOWN IN THIS CASE.

15 THE COURT: HAS MR. GROSS MADE ANY REPRESENTATIONS
16 WITH REGARD TO THE CONFIDENTIAL INFORMATION BEING RELEASED
17 PRIOR TO THE RELEASE OF THAT INFORMATION BY DCMS?

18 MR. SULLIVAN: YES. AND HE STATED IN OPEN COURT HE
19 HAD NO IDEA THAT WAS GOING ON.

20 THE COURT: BUT ONCE THE ANNOUNCEMENT OF THE
21 POSITION OF MR. COLLINS TOOK PLACE AND IT WAS EXPOSED TO THE
22 PRESS --

23 MR. SULLIVAN: M-HM (AFFIRMATIVE).

24 THE COURT: -- BUT BEFORE THE CONFIDENTIAL
25 INFORMATION WAS ACTUALLY RELEASED, DID MR. GROSS MAKE ANY
26 COMMENTS ABOUT GETTING AHEAD OF THE RELEASE OF THAT

1 INFORMATION TO ANYONE?

2 MR. SULLIVAN: I DO NOT BELIEVE SO, NO, BECAUSE HE
3 DIDN'T KNOW THAT THERE WAS GOING TO BE A RELEASE. YOU KNOW,
4 HIS CLIENT HE EXPECTED WOULD LIVE BY THE TERMS OF THE
5 PROTECTIVE ORDER.

6 THE COURT: THANK YOU, MR. SULLIVAN. THANK YOU VERY
7 MUCH.

8 MR. SULLIVAN: I WOULD ADD AS SOON AS HE FOUND OUT
9 THAT MR. KRAMER WAS IN POSSESSION OF THESE DOCUMENTS, HE DID
10 TAKE EVERY REASONABLE EFFORT TO MAKE SURE THAT THERE WOULD BE
11 NO FURTHER DISCLOSURE.

12 THE COURT: THANK YOU. MR. LERNER.

13 MR. LERNER: THANK YOU, YOUR HONOR. REFERRING TO
14 BEDROCK OR OTHER RIGHTS WITHOUT ANSWERING YOUR HONOR'S
15 QUESTION DOES NOT DEAL WITH THE FACT THAT THERE IS A PRIMA
16 FACIE CASE HERE THAT AGAIN OUTSTRIPS ANYTHING I CAN FIND IN
17 ANY PUBLISHED OPINION. THE CRIME-FRAUD EXCEPTION APPLIED IN
18 THE BP OIL CASE WHERE THE CLIENT IN CONSULTATION WITH COUNSEL,
19 AND YOU DO LOOK AT IT FROM THE CLIENT'S PERSPECTIVE CONTRARY
20 TO THE WAY THIS WAS DESCRIBED TO YOU, WORKED WITH COUNSEL TO
21 WRITE A LETTER THAT INCLUDED MISREPRESENTATIONS. THAT WAS
22 SUFFICIENT FOR APPLICATION OF A CRIME-FRAUD EXCEPTION.

23 IN STATE FARM IT WAS A DECLARATION. THOSE LIMITED
24 MISREPRESENTATIONS IN COMPARISON TO WHAT WE HAVE HERE. WHAT
25 WE HAVE HERE IS NOT SOMEBODY GOING TO THEIR LAWYER AFTER THE
26 FACT AFTER BERNIE MADOFF WAS DISCOVERED TO HAVE BEEN ENGAGED

1 IN A PONZI SCHEME. WHAT WE HAVE HERE AS YOUR HONOR HAS
2 OUTLINED IS FROM THE BEGINNING WORKING HAND IN HAND WITH THE
3 CLIENT ALONG WITH THE CLIENT TO SAY TO OUTSIDE PARTIES, "THE
4 PURPOSE OF THIS LAWSUIT, WHICH WE ARE REPRESENTING TO
5 JUDGE WEINER AND THEN TO JUDGE SWOPE IS A LEGITIMATE MERITS
6 BASED LAWSUIT" IS NOT IN FACT THE MERITS.

7 IT'S TO PUBLICIZE THESE DOCUMENTS AND TO QUOTE "WE
8 WANT TO WORK WITH YOU TO FIGURE OUT A WAY TO DO THAT." THERE
9 IS A BIG DIFFERENCE BETWEEN AS COUNSEL DESCRIBED FIRST
10 AMENDMENT RIGHTS, WHICH WE UNDERSTAND AND HAVE NO INTEREST IN
11 CHILLING. AND SECURING THROUGH REPRESENTATIONS TO PARTIES AND
12 THE COURT THAT ONE WILL KEEP INFORMATION CONFIDENTIAL IN ORDER
13 TO GET IT IN DISCOVERY WHILE SIMULTANEOUSLY TELLING OTHER
14 PEOPLE OUT OF THE OTHER SIDE OF YOUR MOUTH THAT YOU WANT TO
15 WORK TO FIND A WAY TO MAKE IT PUBLIC, TELLING THIS COURT WE'RE
16 FOCUSED ON THE MERITS. THIS IS AN IMPORTANT CASE. AND
17 MR. SCARAMELLINO TELLING A THIRD PARTY IT DOESN'T HAVE
18 ANYTHING TO DO WITH THE CASE. IT DOESN'T HAVE TO DO WITH
19 SIX4THREE. IT DOESN'T HAVE TO DO WITH THE APP. WE WANT TO
20 SHINE THE LIGHT AND HAVE PUBLIC INFORMATION ABOUT THIS.

21 THE ISSUE HERE THAT YOUR HONOR IDENTIFIED IS CRIME
22 FRAUD AS TO THE PROTECTIVE ORDER AND THE SUBSEQUENT ORDERS TO
23 ABIDE BY IT. THAT HAS NOTHING TO DO WITH WHAT'S TOTALLY FAIR
24 GAME WHETHER OR NOT IT'S JOURNALISTS OR OTHER PEOPLE
25 INVESTIGATING OUTSIDE OF COURT AND NOT PROMISING TO KEEP THE
26 INFORMATION CONFIDENTIAL. AND THEN INVITING WITHOUT TELLING

1 US OR YOU EVERY WHICH WAY AN OPPORTUNITY TO GET AROUND THAT.
2 AND THEN BY THE WAY DOING IT, WHICH NOBODY HERE IS ALSO SAYING
3 IN ANSWER TO YOUR QUESTIONS. THERE'S NO MYSTERY HERE ABOUT
4 WHAT HAPPENED. IT HAPPENED. IT WAS DISCLOSED.

5 NOW, NOT ONLY HAVE WE TALKED ABOUT THE CASES, LET'S
6 TALK ABOUT THE POINT WITH RESPECT TO THE PURPOSE OF THE
7 LAWSUIT WHICH YOU HIT ON. AGAIN, ABSOLUTELY RIGHT. THE
8 PURPOSE OF THIS LAWSUIT IS SUPPOSED TO BE THE MERITS, NOT
9 PUBLICIZING DOCUMENTS THAT YOU PROMISED TO KEEP HIGHLY
10 CONFIDENTIAL.

11 AND IS THIS UNUSUAL? I AGREE WITH COUNSEL
12 100 PERCENT. IT IS VERY UNUSUAL. I HAVE SAID IT REPEATEDLY
13 AND I WILL SAY IT AGAIN. I HAVE NEVER SEEN A CASE LIKE THIS.
14 I HAVE LOOKED THROUGH ALL THE STATE COURT CASES I CAN FIND.
15 I'VE LOOKED THROUGH ALL THE FEDERAL COURT CASES I CAN FIND. I
16 HAVE NEVER FOUND ANYTHING APPROXIMATING A VIOLATION OF A
17 PROTECTIVE ORDER OF THIS SCOPE. LET ALONE ONE THAT IS
18 PRECEDED BY PLEASE SERVE US WITH ORDERS FOR US TO DISCLOSE
19 THESE DOCUMENTS. FOLLOWED BY I DON'T SHARE THAT INFORMATION.

20 AND THEN LOW AND BEHOLD I SHOW UP IN ANOTHER COUNTRY
21 WHERE IT COULD BE ENFORCED. THERE IS NOTHING LIKE THIS. SO
22 IS IT UNUSUAL? ABSOLUTELY.

23 LAST POINT. EXIGENT CIRCUMSTANCES. AGAIN, I FEEL
24 FAIRLY CONFIDENT SAYING HAVING LOOKED VERY CAREFULLY THERE IS
25 NO BETTER CASE FOR A FINDING OF EXIGENT CIRCUMSTANCES HERE.
26 THESE DOCUMENTS KEEP ON POPPING UP. IT HAPPENS ALMOST EVERY

1 WEEK WE'RE IN FRONT OF YOU AND NOBODY CAN SAY WHY. NOBODY
2 WILL SIGN DECLARATIONS THAT ACTUALLY CONFIRM OR SAY THESE ARE
3 THE PEOPLE. MR. SCARAMELLINO DID NOT SAY HERE IS A LIST OF
4 THE PEOPLE I SHARED THIS WITH. MR. DEHAYE HAS REFUSED TO SIGN
5 THE DECLARATION BECAUSE IT WOULD BE TOO BURDENSOME TO SAY WHO
6 HE SHARED IT WITH.

7 WE DON'T HAVE A WAY OF FINDING OUT THIS INFORMATION
8 BUT FOR ASKING THESE GENTLEMEN AND THE TWO LAWYERS ABOUT WHAT
9 HAPPENED HERE, SO IT IS EXIGENT. WE DON'T HAVE ANOTHER GOOD
10 WAY TO GET IT. IT'S HAPPENING NOW AS WE SPEAK. IT CONTINUES
11 TO HAPPEN. AND THE OTHER PIECE HERE IS JUST AS A MATTER OF
12 FAIRNESS IN TERMS OF GETTING TO THE BOTTOM OF THIS. TO DATE
13 YOU HAVE STILL ONLY HEARD ONE SIDE OF THE STORY FROM
14 MR. KRAMER FROM MR. SCARAMELLINO FROM MR. GODKIN AND
15 MR. GROSS.

16 THEY HAVE BEEN ALLOWED TO TELL YOU IN COURT
17 REPEATEDLY, YOUR HONOR, WE ONLY DID "X." WE ONLY DID "Y."
18 IT'S ALL ON THE UP AND UP. WE SHOULD BE ALLOWED TO SUBMIT
19 DECLARATIONS THAT SAID WE ONLY DID "X." WE ONLY DID "Y."
20 WELL, YOU WILL RECALL WHEN THEY SAID THERE WERE NO
21 COMMUNICATIONS WITH OTHER PEOPLE, WE GOT 9,000 DOCUMENTS.
22 PAGES OF DOCUMENTS OF COMMUNICATIONS WITH OTHER PEOPLE.

23 SO EVERY TIME WE GET LIKE I SAID THE OTHER DAY A RAY
24 OF SUNSHINE ON THIS, IT'S NOT ACCURATE. AND WE DO NEED TO
25 FIGURE IT OUT AND WE NEED TO FIGURE IT OUT NOW.

26 THE COURT: SO IS IT YOUR POSITION THAT COMMENTING

1 ON THE 9,000 PAGES OF DOCUMENTS THAT THE PLAINTIFFS HAVE FALLS
2 OUTSIDE OF THE SCOPE OF THE FOUR CORNERS OF THE COMPLAINT?

3 MR. LERNER: SORRY, YOUR HONOR. I WAS PROBABLY
4 CONFUSING ON THAT. SO THE 9,000 DOCUMENTS I WAS REFERRING TO.
5 THE 9,000 PAGES WHAT WAS WHAT WAS PRODUCED BY MR. GODKIN AFTER
6 YOUR HONOR SAID, "PRODUCE YOUR COMMUNICATIONS WITH THIRD
7 PARTIES."

8 THE COURT: YES.

9 MR. LERNER: THE -- TO ANSWER YOUR QUESTION, I AGREE
10 WITH YOU 100 PERCENT. LAWYERS, OF COURSE, CAN SAY WE HAVE A
11 COMPLAINT IN COURT. IT'S ABOUT X, Y AND Z. I'M HAPPY TO
12 DESCRIBE IT FOR YOU. I'M HAPPY TO GIVE YOU A DISCUSSION OF
13 WHAT I THINK THE LAW IS. I'M HAPPY TO TELL YOU WHAT EVEN
14 LAWYERS WILL SAY I'LL TELL YOU WHAT I THINK IS GOING TO HAPPEN
15 IN THIS CASE.

16 BUT WHAT LAWYERS CAN'T DO IS PLAN ALONG WITH THEIR
17 CLIENTS OPENLY TO TRY TO PUBLICIZE THE VERY SAME DOCUMENTS
18 THAT THEY ARE PROMISING THEIR ADVERSARY AND THE COURT THEY ARE
19 KEEPING SECRET IN A WAY THAT MAKES IT IMPOSSIBLE TO IN FACT
20 KEEP THOSE DOCUMENTS SECRET.

21 NOW, EVEN ON THE POINT ABOUT WHAT THEY'VE BEEN
22 SUMMARIZING, EXHIBIT 12 WHICH WE SHOWED YOU IS NOT CONSISTENT
23 WITH WHAT THEY'RE ARGUING. EXHIBIT 12 SAYS MY FIRM OBTAINED
24 EXTENSIVE DISCOVERY OF COMMUNICATIONS BETWEEN ZUCKERBERG AND
25 OTHER EXECUTIVES. AND THAT'S WHAT I'M SUMMARIZING. SO
26 EXHIBIT 12 UNLIKE WHAT COUNSEL TOLD YOU IS NOT JUST THE

1 SUMMARY OF THE COMPLAINT. HE'S SAYING I'M SUMMARIZING THE
2 EXTENSIVE DISCOVERY WE'VE RECEIVED.

3 BUT THE BIGGER POINT, WHICH I BELIEVE YOUR HONOR HAS
4 ALREADY HONED IN ON IS THERE IS AN EVEN LARGER PROBLEM WHICH
5 IS YOU OBVIOUSLY CANNOT BE ENGAGED IN A SCHEME TO USE A
6 LAWSUIT TO ACCOMPLISH A GOAL THAT HAS NOTHING TO DO WITH
7 RESOLVING THE MERITS WHICH IS PUBLICIZING THE VERY DOCUMENTS
8 THAT YOU SECURED UNDER THE PROTECTIVE ORDER SO THAT YOUR
9 ADVERSARY BELIEVED THEY WOULD BE USED ONLY FOR THE PURPOSE OF
10 THE LITIGATION.

11 IF WE GO PAST THAT AND WE DON'T HAVE A RULING HERE,
12 NOBODY WILL TAKE THIS SERIOUSLY GOING FORWARD. PEOPLE OF
13 COURSE ARE WATCHING THIS. IT IS AS YOUR HONOR SAID
14 UNPRECEDENTED. IT IS A MATTER OF FIRST IMPRESSION. AND IF
15 PEOPLE DON'T HAVE TO TAKE IT SERIOUSLY AND THE ANSWER IS YOU
16 CAN GO AHEAD AND SECURE SENSITIVE DOCUMENTS AND THEN GO TO
17 WHATEVER OFFICIAL YOU CHOOSE AND SAY "LET'S WORK OUT A WAY FOR
18 YOU TO GET THESE DOCUMENTS FROM ME SOMEWHERE ELSE AND THEN WE
19 WILL ALL JUST SCATTER TO THE WIND AND PUBLICIZE THEM AND THROW
20 THEM ON THE INTERNET." PARTIES ARE OBVIOUSLY GOING TO HAVE A
21 VERY GOOD ARGUMENT TO COME BEFORE YOUR HONOR IN THE NEXT CASE
22 AND SAY, "YOUR HONOR, WE'RE NOT PRODUCING IT. THERE'S NO
23 WAY."

24 THE COURT: WAS THERE ANY REPRESENTATION BY
25 MR. KRAMER, FOR EXAMPLE, SAYING THAT HE WOULD BE AMENDABLE TO
26 SOME LEGAL PROCESS TO DISCLOSE THESE CONFIDENTIAL DOCUMENTS?

1 MR. LERNER: THE SEQUENCE OF EVENTS AS WE HAVE IT
2 JUST BASED ON THE FEW DOCUMENTS THAT WE HAVE SEEN IS THAT
3 MR. KRAMER IS IN TOUCH WITH MR. COLLINS. AND AMONG OTHER
4 THINGS, HE INVITES AND SAYS, "I WILL ACCEPT SERVICE OF A
5 SUBPOENA." BUT HE THEN HIGHLIGHTS AND EXPLAINS AND NOTE
6 MR. KRAMER IS NOT A LAWYER AND HAS REPEATEDLY SAID AS SUCH.
7 BUT, BOY, THE COMMUNICATIONS ARE EITHER CUT AND PASTE IN FRONT
8 THE LAWYERS. THEY SURE READ LIKE SOMEBODY REVIEWED IT. HE
9 SAYS AS A NON-LAWYER, "YOU COULD SERVE ME WITH A SUBPOENA.
10 BUT IF IT'S IN THE UNITED STATES, THEN FACEBOOK WOULD GET THE
11 CHANCE TO OBVIOUSLY OBJECT AND SHOW UP. THEY WOULD KNOW ABOUT
12 IT."

13 SO HE INVITES THE SUBPOENA FOR THESE DOCUMENTS,
14 WHICH THEY'VE IDENTIFIED FOR MR. COLLINS. SO THE ANSWER TO
15 YOUR QUESTION, "MR. COLLINS, HERE IS THESE DOCUMENTS. I'VE
16 IDENTIFIED THEM FOR YOU SPECIFICALLY. SERVE A SUBPOENA ON ME.
17 BUT BY THE WAY, IF DO YOU IT IN THE U.S., FACEBOOK WILL HAVE
18 THE CHANCE TO PROTECT ITS RIGHT IN COURT." AND THEN -- AND
19 WE'RE NOT TOLD ABOUT THIS.

20 THEN WHAT HAPPENS IS MR. COLLINS SAYS, "UNDERSTOOD.
21 HERE IS A REQUEST, BUT IT'S UNDER U.K. LAW. SO IT DOESN'T
22 APPLY EXTRATERRITORY. IT DOESN'T HAVE EXTRATERRITORIAL
23 APPLICATION. THEN WHAT YOU HAVE. AND I SUBMIT THAT UNDER
24 ANY STANDARD OF PROOF THIS IS A PROBLEM. THEN WHAT YOU HAVE
25 IS AFTER THOSE TWO EXCHANGES, MR. KRAMER GOES TO ENGLAND. THE
26 DAY BEFORE HE GOES OVER TO PARLIAMENT ON ALLEGEDLY A COLD CALL

1 FOR SOME REASON WITH HIS LAPTOP AND THUMB-DRIVE. AND THEN
2 ALLEGEDLY SURPRISED HE APPARENTLY CHANGES THE PASSWORD FOR THE
3 DROPBOX ACCOUNT THAT HE SWORE UNDER PENALTY OF PERJURY HE
4 NEVER ACCESSED AND PRODUCES IT ALL. SO DID HE INVITE IT?
5 YEAH, TWICE. FIRST FOR THE U.S. SUBPOENA, WHICH HE DIDN'T
6 WANT TO DO BECAUSE HE KNEW HE HAD THE CHANCE. AND THEN WITH
7 THE U.K. SUBPOENA, WHICH HE WENT TO THE U.K. AND PRODUCED
8 DOCUMENTS IN RESPONSE TO IT.

9 THE COURT: THANK YOU, MR. LERNER.

10 MR. LERNER: THANK YOU.

11 MR. MURPHY: YOUR HONOR.

12 THE COURT: YES, MR. MURPHY.

13 MR. MURPHY: IF I COULD JUST BE BRIEFLY HEARD?

14 THE COURT: YES. I BELIEVE MR. RUSSO ALSO HAS.

15 MR. RUSSO: I DO, YOUR HONOR. I THINK YOU'VE ASKED
16 THE RIGHT QUESTIONS. AND, IN FACT, IF YOU LOOK BACK TO THE
17 DECEMBER 17 HEARING, WE'RE COVERING THE GROUND THAT WAS
18 COVERED ON DECEMBER 17 WHEN MR. SCARAMELLINO WAS HERE.
19 I BELIEVE MR. LERNER HAS TWISTED SOME OF THE EMAILS HE SAYS IN
20 EFFECT. MR. SCARAMELLINO SAYS THIS, "WE WILL GET YOU THE
21 EXACT EMAIL." MR. SCARAMELLINO SAID TO YOU THIS CASE CAUSED A
22 WORLD WIND OF INTEREST FROM THE PRESS. HE SAID THAT. THERE'S
23 PRESS HERE. THERE'S PRESS TAKING NOTES NOW. YOU COULD SURVEY
24 THE COURTROOM. THIS CASE HAS GENERATED PRESS. WHEN THAT
25 HAPPENS, THERE'S A CYCLE. A NORMAL CYCLE OF COMMUNICATIONS
26 WITH THE PRESS.

1 COUNSEL SEEMS TO BE SAYING THIS ENTIRE LAWSUIT -- I
2 OBVIOUSLY WAS NOT INVOLVED WITH IT TO BEGIN WITH. I CAME IN
3 MUCH LATER AS YOU NOTED IN THE HEARING ON WEDNESDAY.

4 COUNSEL IS SAYING THE ENTIRE CASE WAS ABOUT GETTING
5 SOME TYPE OF PUBLIC RELEASE OF FACEBOOK DOCUMENTS. THERE
6 ACTUALLY IS A MECHANISM IN THE PROTECTIVE ORDER THAT
7 ANTICIPATES THAT THAT MAY HAPPEN. REMEMBER, FACEBOOK WAS JUST
8 CHARGED OR IT'S BEEN DISCLOSED IN NEW YORK. THIS IS A PUBLIC
9 KNOWLEDGE NOW THAT THEY ARE UNDER A CRIMINAL INVESTIGATION.

10 IF THE ISSUE TODAY, AS MR. LERNER IS SUGGESTING, IS
11 THE MINUTE THAT THE DEPARTMENT OF JUSTICE CALLS UP MR. KRAMER
12 OR MR. SCARAMELLINO SAYING, "WE UNDERSTAND BASED ON READING
13 THE PRESS AND LOOKING AT THE DOCUMENTS IN SAN MATEO THAT YOU
14 HAVE BEEN IN LITIGATION. WE HAVE QUESTIONS FOR YOU. WE WANT
15 YOU TO COOPERATE WITH US IN THE DEPARTMENT OF JUSTICE WHERE WE
16 KNOW THE FEDERAL TRADE COMMISSIONS IS ALSO INVESTIGATING."
17 THAT'S BEEN PUBLICLY RELEASED BY BOTH THE FTC AND FACEBOOK.

18 AND THEY CALL UP AND THEY SAY, "WE CAN SERVE YOU
19 WITH A SUBPOENA." THERE MAY BE A CONGRESSIONAL SUBPOENA. IN
20 THIS CASE THERE WAS A PARLIAMENTARY SUBPOENA. WHAT THEY ARE
21 SAYING IS THAT THIS CASE ANTICIPATED ORCHESTRATING THE
22 PARLIAMENT IN THE UNITED KINGDOM TO CAUSE EFFECTIVELY AN ACT
23 OF CONGRESS IN PARLIAMENT TO GET A SUBPOENA ISSUED AND SERVED
24 ON MR. KRAMER. THAT IS SO OUTRAGEOUSLY IMPOSSIBLE AND
25 PLAUSIBLE TO IMAGINE. BUT LET'S TAKE THAT ASSERTION FOR JUST
26 A SECOND. AND THEN I WILL DIRECT THE ANSWER TO THE QUESTION

1 ABOUT WHAT MR. KRAMER DID.

2 LET'S TAKE THE ASSERTION THAT THEY ACTUALLY
3 ANTICIPATED THAT THE PRESS WOULD GENERATE ALL THIS. I THINK
4 IT'S OUTRAGEOUS. BUT LET'S JUST GO WITH THAT ARGUMENT. THEY
5 SIGNED SECTION 16 OF THIS PROTECTIVE ORDER SAYING, "THERE MAY
6 BE COURT ORDERS AND SUBPOENAS AND OTHER GOVERNMENTAL PROCESSES
7 SERVED ON YOU. WHEN THAT HAPPENS, YOU HAVE TO GIVE US
8 NOTICE." NOT WHEN BEFORE IT HAPPENS. NOT WHEN IF YOU GET AN
9 INKLING LIKE THE DEPARTMENT OF JUSTICE CALLS YOU SAYING, "WE
10 HAVE AN INQUIRY FOR YOU."

11 IT DOESN'T SAY THAT. IT SAYS, "WHEN YOU GET SERVED,
12 YOU TELL US." THAT'S EXACTLY WHAT MR. GODKIN DID. THAT'S
13 EXACTLY THE COMPLIANCE THAT WAS ANTICIPATED BY THIS VERY ORDER
14 THAT THEY'RE ASSUMING. AND YOUR HONOR SAID ON DECEMBER 17
15 WHEN I RAISED THIS. THE FIRST APPEARANCE I MADE HERE WAS ON
16 DECEMBER 17.

17 YOU SAID, "WE'RE NOT THERE YET. WE'RE NOT AT THE
18 LEVEL OF ACTUALLY ADJUDICATING SECTION 16 OF THE PROTECTIVE
19 ORDER." I THINK WE'RE THERE RIGHT NOW TODAY. WE HAVE TO GET
20 FACEBOOK'S SIDE OF DID THEY DO ANYTHING IN THE U.K.? BECAUSE
21 THAT'S WHAT THIS SAYS. SECTION 16 SAYS, "SPECIFICALLY THE
22 PARTY WHO HAS DESIGNATED MUST ACTUALLY GO FORWARD SHALL BEAR
23 THE BURDEN AND EXPENSE OF SEEKING PROTECTION IN THAT
24 JURISDICTION IN THAT COURT."

25 THE COURT: MR. RUSSO, I HATE TO INTERRUPT YOUR
26 ARGUMENT. BUT THIS GIVES RISE TO A FUNDAMENTAL QUESTION.

1 YOUR ARGUMENT RAISES SOME HYPOTHETICALS ABOUT CRIMINAL
2 INVESTIGATIONS AND SUBPOENAS THAT MAY BE ISSUED AS A RESULT,
3 CORRECT?

4 MR. RUSSO: YES, BECAUSE I HEAR MR. LERNER
5 SUGGESTING THAT THEY SHOULD TELL HIM WHAT'S GOING ON IF THEY
6 EVEN GET A PHONE CALL.

7 THE COURT: IN THIS CASE THERE IS EXPRESSED EVIDENCE
8 OF MR. KRAMER OFFERING TO SUBMIT TO SUBPOENAS AHEAD OF TIME
9 FOR THE EXPRESSED PURPOSE OF DISCLOSING THIS INFORMATION. I
10 WILL MAKE MYSELF AVAILABLE FOR SUBPOENA. HE IS ANXIOUS. HE
11 IS ANXIOUS TO GET THIS INFORMATION OUT. AND HE SAYS, "LOOK.
12 I CAN'T DISCLOSE IT. THERE'S A PROTECTIVE ORDER. BUT IF YOU
13 SUBPOENA ME, WE CAN DO THAT." SO HE VOLUNTARILY MADE THAT
14 DECLARATION TO MR. COLLINS.

15 AND, FURTHER, IT APPEARS THAT THERE HAD BEEN
16 DISCUSSIONS THAT HAD BEEN GOING ON FOR MONTHS BETWEEN THE DCMS
17 AND MR. KRAMER. AND THERE WERE DISCUSSIONS IN THE ABSTRACT
18 ABOUT THE CONFIDENTIAL INFORMATION. THE FACT THAT HE HAD IT.
19 HE HAD ACCESS TO IT.

20 AND, FURTHER, IT APPEARS THAT AT LEAST AS EARLY AS
21 THE BEGINNING OF OCTOBER, WEEKS BEFORE HE ACTUALLY WENT TO THE
22 U.K. THAT HE HAD ACCESS TO THAT CONFIDENTIAL INFORMATION.

23 AND, FINALLY, I HAVE BEEN ASKING THIS QUESTION SINCE
24 NOVEMBER 30 OF 2018. WHY DID MR. KRAMER HAVE THIS INFORMATION
25 IN THE FIRST CASE? WHY DID HE HAVE IT IN THE FIRST PLACE
26 GIVEN THAT THE STIPULATED PROTECTIVE ORDER PROHIBITED HIM FROM

1 HAVING THIS INFORMATION, UNLESS THERE IS SOME LITIGATION ISSUE
2 PARTICULAR TO THE IMPORTANCE OF HAVING THIS INFORMATION IN HIS
3 HANDS SUCH THAT HE SHOULD LAY EYES ON IT. ESSENTIALLY THAT
4 PROTECTIVE ORDER WAS FOR THE ATTORNEY'S EYES ONLY AND EXPERTS
5 THAT WOULD SIGN A CERTIFICATION.

6 SO HE HAD NO BUSINESS HAVING THAT CONFIDENTIAL
7 INFORMATION IN THE FIRST INSTANCE, BUT IT APPEARS BASED UPON
8 THE EMAILS THAT I'VE READ THAT HE WAS ESSENTIALLY DANGLING
9 THIS CONFIDENTIAL INFORMATION OUT THERE SAYING THAT HE WAS
10 ANXIOUS TO FIND A MECHANISM TO DISCLOSE THIS INFORMATION AND
11 EVEN GOING THE NEXT STEP TO SAY, "I WOULD BE AMENDABLE TO A
12 SUBPOENA IF YOU ISSUE ONE."

13 NOW, HOW IS THAT NOT AN ATTEMPT ON THE PART OF YOUR
14 CLIENT TO DISCLOSE CONFIDENTIAL INFORMATION PROTECTED BY THE
15 STIPULATED PROTECTIVE ORDER? IF THIS WAS ONLY ABOUT THE
16 LAWSUIT, WHY WOULD ANYBODY EVEN BE TALKING ABOUT CONFIDENTIAL
17 INFORMATION THAT'S AVAILABLE? WHY?

18 MR. RUSSO: BECAUSE, YOUR HONOR, THE REFERENCE YOU
19 MADE TO THE MONTHS AHEAD OF TIME. THE WORLD WIND THAT HAPPENS
20 WITH THE PRESS AND WITH CONGRESSIONAL COMMITTEES AND BY
21 EXTENSION PARLIAMENT WHO ARE ALL INVESTIGATING FACEBOOK. BOTH
22 CIVILLY AND CRIMINALLY IS A DIALOGUE. WHAT'S THE LAWSUIT
23 ABOUT? THE LAWSUIT IS ABOUT 30,000 OTHER COMPANIES IN
24 ADDITION TO OUR COMPANY THAT WERE SHUT DOWN BY A CHANGE OF
25 FACEBOOK POLICY.

26 WHAT REMEDIES ARE YOU SEEKING IN THE LAWSUIT? WE

1 WOULD LIKE TO GET COMPENSATION. WE WOULD LIKE TO SEE A CHANGE
2 IN POLICY. WE THINK THERE ARE 30,000 OTHER COMPANIES THAT
3 ALSO SEEK THAT. IT'S ALL PUBLIC. IT'S IN THE 5TH AMENDED
4 COMPLAINT. IT'S ALL THERE.

5 THE DISCUSSION KEEPS PROCEEDING TO HOW FAR IS
6 DISCOVERY? THESE ARE ALL GENERIC QUESTIONS WITH GENERIC
7 ANSWERS. HE HAS RIGHTS AS THE PRINCIPAL AS THE MANAGING
8 MEMBER OF SIX4THREE NOT TO HAVE HIGHLY CONFIDENTIAL DOCUMENTS.
9 THAT'S CLEAR. BUT TO HAVE CONFIDENTIAL DOCUMENTS. HE'S
10 ENTITLED TO THAT. THAT'S IN THE PROTECTIVE ORDER. THERE'S
11 TWO CLASSES OF DOCUMENTS. THE HIGHLY CONFIDENTIAL ATTORNEY'S
12 EYES ONLY.

13 APPARENTLY THERE WAS SOME GLITCH WITH DROPBOX WHERE
14 HE HAD ACCESS TO BOTH ON HIS MACHINE. BOTH THE CONFIDENTIAL,
15 WHICH HE RIGHTFULLY DID HAVE RIGHTS TO AS WELL AS CERTAIN
16 FILES. WE DON'T KNOW WHAT THE PERCENTAGE IS. MAYBE IT'S TEN
17 PERCENT. MAYBE IT'S LESS THAN TEN PERCENT. IT'S NOT A HUGE
18 NUMBER.

19 THE COURT: HE KNEW THAT WEEKS BEFORE HE WENT TO THE
20 U.K.

21 MR. RUSSO: I DON'T THINK SO, YOUR HONOR. I THINK
22 THERE'S AN EMAIL THAT'S BEEN INTERPRETED IN A WAY THAT'S
23 INCONSISTENT WITH WHAT WAS ACTUALLY THE CASE. I THINK WHAT IT
24 SAYS IS THAT I HAVE POSSESSION. I THINK IT WAS MEANT TO BE
25 SAYING OR HE WAS SAYING USING HIS OWN COLLOQUIAL WORDS. MY
26 COMPANY HAS POSSESSION OR THE LAWYERS HAVE POSSESSION. WE

1 COULD INSPECT THAT EMAIL BECAUSE YOUR HONOR POINTED TO THAT
2 EMAIL OUT TO ME BACK AT THE DECEMBER 17 HEARING. I REMEMBER
3 LOOKING AT IT. I REMEMBER THINKING WHO WROTE THIS EMAIL? WHO
4 REVIEWED IT? OBVIOUSLY IT'S ALL INTERESTING STUFF FROM THAT
5 PERSPECTIVE, BUT WE HAVE A SITUATION WHERE IT WAS A
6 PARLIAMENTARY ORDER SERVED ON HIM BY THE SERGEANT-AT-ARMS WITH
7 THE STATEMENT THAT HE WAS IN CONTEMPT IN LONDON.

8 THE COURT: WHEN? WHEN? WHEN? WHEN WAS THAT
9 SERVED?

10 MR. RUSSO: IN NOVEMBER IN THE U.K.

11 THE COURT: WHEN IN NOVEMBER, SIR?

12 MR. RUSSO: A COUPLE OF DAYS BEFORE THANKSGIVING.

13 THE COURT: OKAY.

14 MR. RUSSO: A FEW DAYS BEFORE THANKSGIVING.

15 THE COURT: ALL RIGHT.

16 MR. RUSSO: I MEAN THOSE FACTS ARE IN THE RECORD,
17 YOUR HONOR. THERE'S NO DISPUTE ABOUT THEM.

18 THE COURT: SO ARE YOU SAYING THAT A GOVERNMENTAL
19 ENTITY NOT ONLY DURING THE COURSE OF THE THANKSGIVING HOLIDAY
20 BUT PRIOR TO THAT EARLY ON CONTACTED YOUR CLIENT FOR THE
21 EXPRESSED PURPOSE OF GETTING INFORMATION ABOUT THE HIGHLY
22 CONFIDENTIAL INFORMATION IN THE CASE? IS THAT WHAT YOU'RE
23 SAYING?

24 MR. RUSSO: I'M SAYING SIX4THREE DID NOT VOLUNTARILY
25 TURN OVER. AND MR. KRAMER DID NOT VOLUNTARILY TURN OVER
26 DOCUMENTS. THE POSITION THAT THEY'RE TAKING IS WHEN ANY

1 GOVERNMENTAL ENTITY. AND THIS IS A STRANGE POSITION BECAUSE I
2 DON'T THINK THAT'S WHAT THE PROTECTIVE ORDER SAYS. I DON'T
3 THINK IT CAN EVEN BE INTERPRETED THAT WAY. WHEN SOME THIRD
4 PARTY CONTACTS YOU AND SAYS, "WE WOULD LIKE" -- "WE'RE DOING
5 AN INVESTIGATION. WE'RE CHARGING FACEBOOK WITH A CRIME.
6 WE'RE CHARGING FACEBOOK WITH FRAUD. WE WANT TO ACTUALLY GET
7 ACCESS TO THE ENTIRE LITIGATION FILE. WE WANT TO KNOW WHETHER
8 YOU'RE GOING TO COOPERATE AND FIGHT US." AND HE COMES BACK
9 AND SAYS, "YOU WILL HAVE TO SERVE ME WITH A SUBPOENA. YOU
10 WILL HAVE TO SERVE ME WITH A SUBPOENA AND THEN DEAL WITH
11 FACEBOOK BECAUSE THAT'S WHAT SECTION 16 OF THE PROTECTIVE
12 ORDER SAYS."

13 THAT'S WHAT THEY'RE CONSTRUING AS IT WAS ALL A WINK
14 AND NOD. IT WAS ALL FABRICATED. IT WAS ALL FROM THE DAY THE
15 LAWSUIT STARTED. THIS WAS ALL DESIGNED. MULTIPLE LAWYERS BY
16 THE WAY -- THE PREVIOUS LAWYERS WHO WROTE THIS PROTECTIVE
17 ORDER WERE FACEBOOK'S LAWYERS IN A PREVIOUS LAW FIRM.

18 THE PROTECTIVE ORDER HAS NEVER BEEN AMENDED EVEN
19 WITH ALL THESE CYCLES. SECTION 16 STILL READS EXACTLY THE WAY
20 IT READS. THERE MAY BE OTHER ISSUES THAT COME UP BEFORE THIS
21 COURT. I WANT TO CLOSE WITH ONE POINT.

22 THERE IS A PROPORTIONALITY ISSUE HERE, YOUR HONOR.
23 THEY WANT SOME SORT OF OPEN-ENDED DISCOVERY AS THOUGH THIS IS
24 APPLE VS. SAMSUNG. THIS IS NOT APPLE VS. SAMSUNG. THAT'S THE
25 CASE THEY CITE. THIS IS NOT A CASE THAT HAS BILLIONS OF
26 DOLLARS WORTH OF ROYALTIES AND DAMAGES IN IT. THIS IS NOT A

1 CASE WITH EVEN MILLIONS OF DOLLARS. THIS IS A CASE OF A SMALL
2 BASICALLY INSOLVENT COMPANY THAT HAS RECENTLY INCURRED HUGE
3 LEGAL FEES. AS WELL AS NOW INCURRED AN ORDER, WHICH THE
4 REASON THERE'S NO ARGUMENT, AS I UNDERSTAND IT, IS THE LAWYERS
5 FELT LIKE THEY COULDN'T GIVE NOTICE TO CHALLENGE THE TENTATIVE
6 RULING.

7 THE COURT: WHAT IS THIS CASE ABOUT NOW, MR. RUSSO?

8 MR. RUSSO: THIS CASE --

9 THE COURT: MR. RUSSO, I'M TALKING.

10 MR. RUSSO: I'M SORRY. I THOUGHT YOU WERE ASKING ME
11 THE QUESTION.

12 THE COURT: I DID ASK A QUESTION. I JUST WANTED TO
13 FINISH MY QUESTION.

14 MR. RUSSO: OKAY.

15 THE COURT: WHAT EXACTLY IS THIS CASE ABOUT NOW?

16 MR. RUSSO: MAY I ANSWER?

17 THE COURT: YES, SIR.

18 MR. RUSSO: OKAY. THIS CASE RIGHT NOW IS ABOUT THE
19 UGLIEST SIDE OF CORPORATE AMERICA RETALIATING AGAINST A GROUP
20 OF INDIVIDUALS THAT ARE TRYING TO RIGHT A CRIME OF FRAUD THAT
21 WAS COMMITTED BY FACEBOOK. THAT'S WHAT THIS IS ABOUT RIGHT
22 NOW.

23 THE COURT: THANK YOU. THANK YOU. IT SEEMS TO ME
24 THAT THIS CHARACTERIZATION OF THE CASE THAT YOU'RE MAKING NOW
25 WAS THE SAME POSITION THAT THEY HAD TAKEN WHEN THIS LAWSUIT
26 WAS FILED CERTAINLY WITHIN THE FILING OF THE 5TH AMENDMENT

1 COMPLAINT -- 5TH AMENDED COMPLAINT. THIS IS THE POSITION THEY
2 WERE TAKING AS DEMONSTRATED IN THOSE EMAILS LEADING UP TO THE
3 DISCLOSURE OF THE HIGHLY CONFIDENTIAL INFORMATION BACK IN
4 NOVEMBER. THAT'S WHAT IT LOOKS LIKE TO THE COURT. I MAY BE
5 WRONG, BUT IT SEEMS TO ME BY AT LEAST A PREPONDERANCE OF THE
6 EVIDENCE THAT -- THAT BASED UPON WHAT I'VE READ IS TAKING
7 PLACE.

8 AND, AGAIN, NO ONE HAS ANSWERED MY QUESTION TO DATE
9 AS TO WHY MR. KRAMER HAD ACCESS TO THE INFORMATION THAT WAS
10 HIGHLY CONFIDENTIAL THAT HE SHOULDN'T HAVE HAD BY THE WAY
11 EARLY IN OCTOBER OR EVEN PRECEDING THAT.

12 MR. RUSSO: BECAUSE THERE WAS A MISTAKE MADE, YOUR
13 HONOR. THERE WAS A MISTAKE MADE WITH THE DROPBOX SETTINGS.
14 THAT'S BEEN STATED BY MULTIPLE PEOPLE.

15 THE COURT: EPIC PROPORTIONS.

16 MR. RUSSO: IT HAPPENS.

17 THE COURT: GIVEN THAT THE MISTAKE HAS BEEN MADE,
18 NOW IT APPEARS THAT MR. KRAMER IS SAYING, "LOOK, I HAVE IT. I
19 HAVE IT NOW." WHAT'S THE BEST MECHANISM TO DISCLOSE THIS?
20 THERE ARE COMMENTS THAT ARE BEING MADE TO THE PRESS MONTHS
21 BEFORE THIS ABOUT WE HAVE THIS CONFIDENTIAL INFORMATION.
22 WE'RE TRYING TO FIND THE BEST MECHANISM TO MAKE IT PUBLIC.
23 AND THAT IS REplete WITHIN THE RECORD. AND A LOT OF THE
24 INFORMATION THAT WAS VOLUNTEERED BY MR. GODKIN. THANK YOU,
25 MR. RUSSO. MS. MEHTA.

26 MS. MEHTA: YES. I JUST WANTED TO MAKE THREE QUICK

1 POINTS, YOUR HONOR. THE FIRST ONE IS WHAT WE JUST HEARD FROM
2 MR. RUSSO IS PRECISELY THE SAME SORT OF GRANDSTANDING AND
3 ATTACK -- OR APPROACH TO COMPLETELY COLLATERAL MATTERS BECAUSE
4 THEY MAY BE INTERESTING TO THE PRESS AND THEY MAY MAKE
5 HEADLINES, BUT THEY HAVE NOTHING TO DO WITH THIS CASE.

6 THE COURT: HOLD YOUR THOUGHT FOR A MOMENT, BUT IT
7 OCCURS TO ME. AND I MAY HAVE A TREMENDOUS GRASP OF THE
8 OBVIOUS. BUT HOW CAN ANY CORPORATION COUNSEL. I MEAN
9 EVERYONE IN THE ROOM. HOW CAN ANY CORPORATION HAVE CONFIDENCE
10 TO ENTER INTO A STIPULATED PROTECTIVE ORDER FOR THE PURPOSES
11 OF THE LITIGATION THAT THAT CONFIDENTIAL OR HIGHLY
12 CONFIDENTIAL INFORMATION WILL NOT BE BROADCAST TO THOSE
13 OUTSIDE THE LAWSUIT?

14 HOW CAN ANYONE HAVE ANY CONFIDENCE IN A STIPULATED
15 PROTECTIVE ORDER? EVERYONE HAS ENTERED THEM. I SIGN THEM ALL
16 THE TIME. AND THIS CASE HAS BEEN POPPING UP IN THE BACK OF MY
17 MIND AS I SIGN THESE STIPULATED PROTECTIVE ORDERS IN MY
18 SIGNING RESPONSIBILITIES AS A CIVIL JUDGE IN THIS COURT.

19 I'M THINKING THESE PEOPLE MAY HAVE CONFIDENCE THAT
20 THE INFORMATION THAT THEY HAVE IS NOT GOING TO BE EXPOSED.
21 THEY'VE SIGNED IT. AND I'M HOPING THAT THEIR INTENT IS TO
22 KEEP EVERYTHING CONFIDENTIAL OR HIGHLY CONFIDENTIAL, AS IT
23 WERE.

24 THIS COMPROMISES THE ENTIRE INTEGRITY OF STIPULATED
25 PROTECTIVE ORDERS AND BY EXTENSION TO AMERICAN JURISPRUDENCE.
26 ONE OF THE TENETS IS KEEPING CONFIDENCES OF A CLIENT

1 INVIOATE, BUT THE OTHER IS HAVING AN UNDERSTANDING THAT
2 COUNSEL SHALL KEEP THINGS CONFIDENTIAL AND BEHAVE IN A MANNER
3 THAT IS APPROPRIATE UNDER THE RULES OF THE PROFESSIONAL
4 RESPONSIBILITY.

5 YOU KNOW, BENJAMIN CARDOZA ONCE SAID, "MEMBERSHIP IN
6 THE PREVENTION IS A PRIVILEGE BASED UPON CONDITIONS. WE ENTER
7 INTO THIS FELLOWSHIP OF LAW FOR SOMETHING MORE THAN PERSONAL
8 GAIN. IT IS TO ACHIEVE THE SYSTEM OF JUSTICE."

9 THAT IS SOMETHING THAT CARDOZA SAID. AND THE COURT
10 HAD SAID IN IN RE SNYDER BACK IN 1985, 1986. THE FEDERAL
11 COURT. I THINK IT WAS THE SUPREME COURT ON A CONFIDENTIAL
12 ISSUE OR A PROFESSIONAL RESPONSIBILITY ISSUE. I'M NOT SEEING
13 THAT HERE TODAY. I'M NOT SEEING THE REVERENCE THAT THERE IS
14 TO THE RULE OF LAW TODAY. WHAT I'M SEEING IS A COMPROMISE OF
15 THE INTEGRITY OF OUR LITIGATION SYSTEM. OUR SYSTEM OF
16 JUSTICE.

17 IF LAWYERS CANNOT RELY UPON THE AGREEMENT BY ANOTHER
18 LAWYER TO KEEP THINGS CONFIDENTIAL PURSUANT TO A STIPULATED
19 PROTECTIVE ORDER, THEN WE'VE ALL LOST. THE PRINCIPLES OF
20 CONFIDENTIALITY AND STIPULATED PROTECTIVE ORDERS GO BEYOND
21 THIS CASE. AND I WILL LEAVE IT AT THAT AS A RESULT WITH
22 REGARD TO STIPULATED PROTECTIVE ORDERS.

23 AS I SAID ON WEDNESDAY ON THE MOTION TO WITHDRAW,
24 THIS CASE IS UNPRECEDENTED. THIS CASE IS A MATTER OF FIRST
25 IMPRESSION TO THE COURT. THERE ARE NO CASES THAT HAVE
26 SUMMARIES OF FACT PATTERNS LIKE THIS ONE. REGARDLESS OF HOW

1 PEOPLE FEEL ABOUT FACEBOOK. AND THIS COURT HAS NO OPINION
2 ABOUT THIS CORPORATION AT ALL.

3 ALL I'M SAYING IS A CORPORATION THAT SIGNED AN
4 AGREEMENT TO KEEP THINGS THAT ARE HIGHLY CONFIDENTIAL AND
5 CONFIDENTIAL IN PLACE UNTIL FURTHER ORDER OF THE COURT OR SOME
6 PROVISION OF THAT CONFIDENTIALITY AGREEMENT IS TRIGGERED.

7 SO THAT PRESENTATION THAT YOU MADE ABOUT FACEBOOK,
8 MR. RUSSO, IS EXHIBIT A FOR WHY YOUR CLIENTS DID WHAT THEY
9 DID. THIS IS THEIR MOTIVATION FOR WHAT I HAVE READ AND
10 REASONABLE MINDS MAY DIFFER, BUT I THINK BY AT LEAST A
11 PREPONDERANCE OF THE EVIDENCE AND MAYBE IN MY OPINION IT'S
12 CLEAR AND CONVINCING THAT THAT MAY HAVE BEEN THE MOTIVATION TO
13 DISCLOSE THAT INFORMATION. OTHERWISE, NO ONE WOULD BE SENDING
14 EMAILS THAT CAPTURE THAT PARTICULAR THOUGHT.

15 MS. MEHTA, YOU HAD A COMMENT TO MAKE?

16 MS. MEHTA: YES, YOUR HONOR. AND I DON'T WANT TO
17 BELABOR THE POINT. I DO WANT TO DIRECT TO YOU TWO SPECIFIC
18 PIECES OF EVIDENCE. I THINK THEY ARE GOING TO BE CRITICAL IN
19 ADDRESSING THE ARGUMENTS THAT WERE MADE BY THE OTHER SIDE.

20 THE FIRST ONE WAS THE SUGGESTION FROM MR. RUSSO THAT
21 IN FACT PEOPLE WERE CALLING HIS CLIENTS ASKING FOR
22 INFORMATION. THAT IS NOT TRUE. THE EMAILS FROM THE DCMS
23 DISCLOSURE AND THE OTHER 9,000 PAGES OF EMAILS THAT WE HAVE
24 SHOW THAT IT WAS MR. KRAMER, MR. SCARAMELLINO, MR. GODKIN AND
25 MR. GROSS THAT WERE ON A CAMPAIGN TO TRY TO GET MEDIA
26 ATTENTION. THE DCMS DISCUSSIONS STARTED BECAUSE MR. KRAMER

1 REACHED OUT TO MR. COLLINS TO VOLUNTEER HIS ASSISTANCE IN THE
2 INVESTIGATION.

3 EXHIBIT 2 TO THE MILLER DECLARATION IS AN EMAIL FROM
4 MR. GODKIN TO THE INFORMATION COMMISSIONER'S OFFICE IN THE
5 UNITED KINGDOM THAT SAYS, "COMMISSIONER DENHAM AND STAFF. MY
6 NAME IS DAVID GODKIN. MY FIRM HAS OBTAINED EXTENSIVE
7 DISCOVERY OF COMMUNICATIONS BETWEEN ZUCKERBERG AND NUMEROUS
8 OTHER FACEBOOK EXECUTIVES AND EMPLOYEES REGARDING FACEBOOK'S
9 TREATMENT OF USER DATA AND THIRD PARTY DEVELOPERS FROM 2007 TO
10 2015."

11 IT GOES ON TO SAY, "I HAVE ATTEMPTED TO SUMMARIZE
12 THE EVIDENCE BELOW. THIS SUMMARY DOES NOT DO THE WEALTH OF
13 EVIDENCE WE HAVE OBTAINED JUSTICE WHICH IS WHY I AM HOPING WE
14 CAN SPEAK TO YOUR OFFICE TO DETERMINE IF THERE'S AN
15 APPROPRIATE MECHANISM FOR YOUR TEAM TO EVALUATE THE EVIDENCE
16 YOURSELF."

17 SO CONTRARY TO MR. MURPHY'S REPRESENTATION THAT THE
18 SUMMARIES ARE FREE SPEECH SUMMARIES OF THE EVIDENCE IN THE 5TH
19 AMENDED COMPLAINT, MR. GODKIN'S OWN WORDS ARE, "WE HAVE
20 INFORMATION. WE'VE SUMMARIZED BELOW. AND BY THE WAY I HAVE A
21 WEALTH OF ADDITIONAL INFORMATION AVAILABLE TO ME THAT I WANT
22 TO PUT INTO YOUR HANDS." THAT IS THE LAWYER PARTICIPATING
23 ACTIVELY IN THE PLAN THAT MR. SCARAMELLINO AND MR. KRAMER AND
24 THE COUNSEL HAD PUT TOGETHER TO PUT ALL OF THIS INFORMATION
25 INTO THE PUBLIC LIGHT.

26 THE COURT: IS THAT SUMMARY IN THE 5TH AMENDED

1 COMPLAINT?

2 MS. MEHTA: THAT SUMMARY IS A VARIETY OF
3 MISSTATEMENTS AND MISALLEGATIONS THAT HAVE INCLUDED SOME
4 THINGS THAT ARE IN THE 5TH AMENDED COMPLAINT AS WELL AS
5 CHARACTERIZATIONS OF EVIDENCE THAT GO BEYOND THAT.

6 EITHER WAY EVEN IF YOU WERE TO ACCEPT THEIR ARGUMENT
7 THAT SUMMARY ITSELF ONLY HAS THE INFORMATION IN THE 5TH
8 AMENDED COMPLAINT, THE FACT THAT HE SAYS "I HAVE A SUMMARY AND
9 I HAVE A WEALTH OF OTHER INFORMATION THAT I WANT TO PUT INTO
10 YOUR HANDS" IS PROOF OF THE PLAN TO TRY TO PROVIDE
11 CONFIDENTIAL AND HIGHLY CONFIDENTIAL INFORMATION TO THE MEDIA
12 AND MORE BROADLY THAN THAT.

13 AND WE HAVEN'T EVEN BEGUN TO TALK TODAY ABOUT THE
14 EXPERTS THAT THEY SIGNED UP WHERE THEY HAVE EMAILS SAYING WE
15 WANT TO GIVE OUR CONFIDENTIAL INFORMATION TO THIS PERSON SO
16 THAT HE CAN SERVE AS AN ANONYMOUS SOURCE FOR THE PRESS TO
17 VERIFY REPORTS. THAT IS ANOTHER MISUSE OF THE PROTECTIVE
18 ORDER. THIS IS INSTANCE AFTER INSTANCE AFTER INSTANCE OF THE
19 LAWYERS AND THE CLIENTS TOGETHER.

20 THE COURT: DO YOU HAVE A DOCUMENT BEFORE YOU THAT
21 SUPPORTS THAT PROPOSITION THAT YOU JUST MADE?

22 MS. MEHTA: YES, YOUR HONOR. IF YOU JUST GIVE ME
23 ONE MOMENT, I'LL PULL IT UP. IT'S EXHIBIT NO. 18. HOLD ON.
24 I THINK THERE'S A BETTER ONE. CITED STARTING AT PAGE NO. 6.
25 AND THIS BEGINS WITH EXHIBIT NO. 17 INTO THE MILLER
26 DECLARATION WHICH IS BG7208 WHERE THERE ARE DISCUSSIONS ABOUT

1 THIS INDIVIDUAL SERVING AS A QUOTE UNQUOTE "EXPERT." AND THAT
2 EXHIBIT 18 SAYS, "I'M NOT SURE IF HE COULD BE AN ANONYMOUS
3 SOURCE VERIFYING OUR ALLEGATIONS WITHOUT DISCLOSING HIM AS AN
4 EXPERT WITNESS IN THE CASE. I'D LIKE YOUR THOUGHTS ON THAT."

5 THEN IN EXHIBIT 19 IS AN EMAIL FROM MR. SCARAMELLINO
6 THAT SAYS, "THE KEY THING WITH THIS EXPERT IS THAT IF THE
7 ARTICLE IDENTIFIES HIM AS AN EXPERT WITNESS OR BASIS HIS
8 CONFIRMATION OF THE ALLEGATIONS ON THE FACT THAT HE HAS
9 REVIEWED THE EVIDENCE, THEN FACEBOOK WILL CRY FOUL AT THE
10 HEARING AND DISTRACT THE JUDGE."

11 AND IT GOES ON TO SAY, "THEY WILL CLAIM FALSELY THAT
12 WE IMPROPERLY REVEALED EVIDENCE THAT VERY WELL COULD CAUSE THE
13 JUDGE TO STEP BACK AND DELAY RULING ON MAKING THE EVIDENCE
14 PUBLIC. THEY RETAINED AN EXPERT TO SERVE AS AN ANONYMOUS
15 SOURCE FOR THE PRESS. THEY FED HIM CONFIDENTIAL INFORMATION.
16 IT'S IN WRITING THEY SAID THEY DIDN'T WANT YOUR HONOR TO KNOW
17 ABOUT IT BECAUSE IT MIGHT CAUSE YOU NOT TO RELEASE THE
18 DOCUMENTS.

19 THE COURT: AND THE SOURCE OF THAT PARTICULAR
20 EXHIBIT?

21 MS. MEHTA: THAT WAS PRODUCED TO US BY BIRNBAUM AND
22 GODKIN COUNSEL FOR SIX4THREE.

23 THE COURT: THANK YOU.

24 MR. SULLIVAN: EXCUSE ME, YOUR HONOR. I WOULD JUST
25 POINT OUT MR. GROSS IS NOT EVEN COPIED ON THESE EMAILS. HE
26 DIDN'T WRITE THEM. HE DIDN'T RECEIVE THEM. HE IS NOT EVEN

1 COPIED. AND MS. MEHTA WHEN SHE SAID THAT MR. GROSS WAS
2 INVOLVED IN THIS CAMPAIGN TO DISCLOSE EVERYTHING TO THE PRESS
3 IS COMPLETELY NOT TRUE. THERE'S NO EVIDENCE OF THAT.

4 AS YOU KNOW, MR. GROSS ONLY BECAME LOCAL COUNSEL IN
5 THIS MATTER MARCH OF 2018 WHICH WAS ONLY 12 MONTHS AGO. HE
6 HAD NO IDEA THAT THIS WAS GOING ON. HE WASN'T EVEN COPIED ON
7 THESE EMAILS. SO TO SUGGEST THAT HE IS PART OF THIS GLOBAL
8 SCHEME TO GET THIS INFORMATION PUBLIC IS NOT SUPPORTED BY
9 ANYTHING. THERE'S NOTHING -- HE'S DENIED SUCH ALLEGATIONS IN
10 HIS DECLARATION AND THERE'S NOTHING TO SUGGEST THAT ANY OF
11 THOSE COMMENTS ARE CORRECT OR TRUE.

12 THE COURT: THANK YOU.

13 MS. MEHTA: YOUR HONOR, ON THAT SPECIFIC POINT AND
14 IT ACTUALLY HITS TO THE FINAL POINT I WANTED TO MAKE. IT IS
15 TRUE MR. GROSS IS NOT ON THAT EMAIL BUT THAT PARTICULAR EXPERT
16 THE PERSON THAT THEY HIRED TO SERVE AS AN ANONYMOUS SOURCE FOR
17 THE PRESS, THAT PURPORTED EXPERT THERE WERE EMAILS INVOLVING
18 MR. GROSS ON WHICH HE WAS COPIED SETTING UP CALLS BETWEEN THAT
19 EXPERT AND AN ENTITY, A MEDIA ENTITY, THAT HAD FILED A BRIEF
20 SEEKING TO UNSEAL THESE DOCUMENTS.

21 MR. GROSS'S ONLY EXPLANATION TO DATE WAS TO SAY, "I
22 WAS COPIED ON ALL THESE EMAILS. EVEN THOUGH I'M COUNSEL, I
23 DON'T READ THEM."

24 MR. SULLIVAN: THAT'S GROSSLY UNFAIR AND THAT'S NOT
25 WHAT HE SAID.

26 THE COURT: I'M TRYING TO SLOW DOWN EVERYBODY FOR

1 THE COURT REPORTER WHO HAS BEEN ON THE RECORD FOR QUITE A
2 WHILE.

3 MR. SULLIVAN: IN OFFENSE TO MR. GROSS, WHAT HE SAID
4 IS THAT HE DID NOT KNOW WHO MR. DEHAYE WAS. HE APPEARED ON A
5 STRING. HE APPEARED AS A CC. MR. GROSS WAS ALSO A CC. HE
6 BELIEVED THAT MR. DEHAYE WAS INVOLVED WITH OPEN MARKET
7 INSTITUTE. AND IF YOU LOOK AT THOSE EMAILS, THERE'S NOTHING
8 IN THERE REGARDING THE DISCLOSURE OF ANY CONFIDENTIAL OR
9 HIGHLY CONFIDENTIAL INFORMATION.

10 AND ADDITIONALLY, IT TALKS ABOUT IF YOU LOOK AT THE
11 SUBSTANCE, IT SAYS -- MR. DEHAYE SAYS, "I COULD BE AVAILABLE
12 FOR A CALL." MR. GROSS DIDN'T RESPOND TO THAT EMAIL. HE'S
13 DECLARED TO THIS COURT THAT HE DIDN'T PARTICIPATE IN ANY CALL.
14 HE DIDN'T ARRANGE FOR ANY CALL. HE READ IT AND THOUGHT MAYBE
15 THERE WAS A CALL, BUT HE HAS NO INFORMATION ABOUT THAT.

16 IN FACT, IT WASN'T UNTIL FACEBOOK FILED THEIR MOTION
17 IN THIS CASE THAT MR. GROSS EVEN FOUND OUT WHO MR. DEHAYE WAS.
18 HE DIDN'T KNOW WHO HE WAS BEFORE LIKE TWO WEEKS AGO.

19 MS. MEHTA: AND, YOUR HONOR, I WOULD JUST DIRECT YOU
20 TO THE NOVEMBER -- I'M SORRY -- THE FEBRUARY 26 DECLARATION
21 FOR MR. GROSS WHICH PURPORTS TO DESCRIBE WHY HE IS ON THESE
22 EMAILS RELATING TO THE CALL BETWEEN THE QUOTE UNQUOTE
23 "ANONYMOUS SOURCE" AND THIS OPEN MARKET INSTITUTE. AND WHAT
24 HE SAYS IS PARAGRAPH 8, "I DID NOT PAY MUCH ATTENTION TO THESE
25 EMAILS WITH THE PRESS ON WHICH I WAS SIMPLY COPIED."

26 BUT THE BROADER POINT IS -- AND THIS IS A POINT

1 MR. LERNER MADE. I THINK IT IS IMPORTANT TO KEEP COMING BACK
2 TO THIS. FOR THE LAST FOUR MONTHS, THE PROCESS HAS ALLOWED
3 EVERYONE ON THE OTHER SIDE TO TELL A ONE SIDED VERSION OF THE
4 STORY INCLUDING MR. KRAMER, MR. SCARAMELLINO, MR. GODKIN,
5 MR. GROSS. ALL OF THEIR LAWYERS GET TO STAND UP IN COURT AND
6 SWEAR NO ONE DID ANYTHING WRONG. NO ONE KNEW WHAT WAS
7 HAPPENING. NO ONE READ THEIR EMAILS. NOBODY WAS ON THE
8 CALLS. AND WE HAVE NOT BEEN PERMITTED TO LOOK AT DOCUMENTS
9 EXCEPT FOR A FEW THAT WOULD PUT THAT TO THE TEST OR TO
10 QUESTION THEM UNDER OATH.

11 THEY HAVE WAIVED PRIVILEGE UP AND DOWN. EVEN BEYOND
12 THE CRIME-FRAUD EXCEPTION. AND WHAT WE'RE ASKING FOR IS THE
13 OPPORTUNITY TO CROSS-EXAMINE THEM AND PUT ALL OF THAT STORY
14 THAT THEY'VE TOLD TO THE TEST SO THAT YOUR HONOR KNOWS WHAT
15 THE REAL FACTS ARE BEFORE WE MOVE FORWARD.

16 MR. SULLIVAN: YOU HONOR, I WOULD JUST ADD WHERE
17 MS. MEHTA SAID THERE WAS ONLY A SMALL AMOUNT OF DOCUMENTS,
18 THERE'S ACTUALLY 10,000 PAGES OF DOCUMENTS. ADDITIONALLY,
19 EVERY TIME AN ATTORNEY SUBMITS A DECLARATION, THEY SHOULD NOT
20 BE SUBMITTED THEN TO A DEPOSITION TO ATTEST TO WHAT THEY
21 ACTUALLY DECLARE. THAT'S NOT THE STANDARD.

22 THE COURT: MR. MURPHY.

23 MR. MURPHY: I STOOD UP SOME TIME AGO. AND I FORGOT
24 WHAT I WAS GOING TO SAY, BUT I CAN SAY THIS. YOU KNOW, I
25 REPRESENT LAWYERS AS THE COURT KNOWS. AND I AM FREQUENTLY
26 REQUESTED TO DISCLOSE THE TERMS OF CONFIDENTIAL SETTLEMENT

1 AGREEMENTS I ENTER INTO. I TELL SOMEONE WHO CALLS ME UP "GO
2 GET A SUBPOENA." IS THAT SOMETHING THAT IS WRONG FOR ME TO
3 DO? I DIDN'T DISCLOSE THE CONFIDENTIAL INFORMATION. HEY, I'M
4 MORE THAN HAPPY FOR YOU TO HAVE THIS INFORMATION. I CAN'T
5 DISCLOSE IT. FACEBOOK REGARDLESS OF THE NUMBER OF COUNSEL
6 ARGUING OR APPEARING HAS NOT SET FORTH ANY BASIS TO CLAIM THAT
7 EFFORTS TO GET AROUND YOUR ORDER THAT ARE LEGAL CONSTITUTE A
8 CRIME OR A FRAUD.

9 SO REGARDLESS -- AND I'M NOT GOING TO ACCEPT
10 EVERYTHING THEY SAY. BUT REGARDLESS WHETHER MY CLIENT
11 MR. GROSS OR MR. KRAMER OR MR. SCARAMELLINO ARE UNDERTAKING
12 EFFORTS TO TEST THE STIPULATED PROTECTIVE ORDER, IT IS NOT A
13 CRIME. AND AS MR. RUSSO POINTED OUT, THERE IS A MECHANISM IN
14 THE PROTECTIVE ORDER TO ALLOW THOSE DOCUMENTS TO BE PRODUCED.

15 NOW, I'M NOT -- I'M NOT GOING TO COMMENT ON THE
16 LENGTH OF TIME THAT THEY HAD TO CHALLENGE THE SUBPOENA, BUT MY
17 UNDERSTANDING IS A SUBPOENA DID ISSUE FROM PARLIAMENT
18 REGARDLESS OF WHETHER MR. KRAMER INVITED IT OR NOT. IN AND OF
19 ITSELF IT IS NOT ILLEGAL. BUT A SUBPOENA DID ISSUE FROM
20 PARLIAMENT. FACEBOOK WAS GIVEN NOTIFICATION OF THE SUBPOENA.
21 FACEBOOK APPARENTLY WAS NOT CLAIMING THAT IT DID NOT HAVE
22 ENOUGH TIME TO CHALLENGE THAT SUBPOENA. BUT THAT WAS THE
23 MECHANISM. SO UP UNTIL THAT POINT IN TIME I DON'T SEE HOW YOU
24 CAN CLAIM THAT ANYTHING THAT WAS DONE WAS DONE ILLEGALLY.
25 THEY DIDN'T DISCLOSE THE INFORMATION. MR. KRAMER DIDN'T
26 DISCLOSE THE INFORMATION UNTIL HE COMPLIED WITH THE SUBPOENA.

1 THAT'S THE INFORMATION THAT WAS DISCLOSED AND WHAT
2 THE COURT FINDS OFFENSIVE. AND I WOULD AGREE IF HE HAD JUST
3 TURNED IT OVER IN VIOLATION OF THE COURT ORDER, THAT WOULD BE
4 OFFENSIVE TO ME AS WELL. BUT APPARENTLY MR. KRAMER IS SAYING
5 HE TURNED IT OVER PURSUANT TO THE TERMS OF THE SUBPOENA. THE
6 NOTIFICATION WAS GIVEN TO FACEBOOK AND THAT FACEBOOK DID
7 WHATEVER IT DID OR DIDN'T DO, SO I'M OFFENDED BY THE NOTION
8 THAT SOMEHOW SEEKING TO ASCERTAIN A WAY TO TEST A COURT ORDER
9 IS ILLEGAL IS A CRIME OR IS A FRAUD IN AND OF ITSELF.

10 SO WHAT WE HAVE HERE IS A MEDIA CAMPAIGN THAT TESTS
11 FREE SPEECH. AND IF YOU WANT TO EMPLOY THE MEDIA AND NOT
12 DISCLOSE TO THEM CONFIDENTIAL INFORMATION, THERE'S NOTHING
13 WRONG WITH THAT. SO IF THE BRIGHT LINE STANDARD IS THE DATE
14 THE INFORMATION CONFIDENTIAL HIGHLY CONFIDENTIAL INFORMATION
15 WAS ACTUALLY TURNED OVER, THEN ALL OF THE EVENTS THAT OCCURRED
16 PRIOR TO THAT POINT IN TIME IN TRYING TO TEST THE STIPULATED
17 ORDER IS NOT A CRIME OR IS NOT A FRAUD.

18 THE COURT: I DO HAVE A QUESTION ON THAT VERY
19 SUBJECT, MR. MURPHY. ARE YOU SAYING THAT YOUR CLIENT'S
20 SUMMARIZATION OF THAT CONFIDENTIAL INFORMATION THAT IS
21 PROTECTED BY THE STIPULATED PROTECTIVE ORDER OKAY?

22 MR. MURPHY: NO. I'M NOT SAYING THAT, YOUR HONOR.
23 I WILL ADDRESS THAT ARGUMENT ASKED BY COUNSEL. THE SUMMARY
24 WAS A SUMMARY OF THE 5TH AMENDED COMPLAINT. AND THEY'RE
25 PUTTING A SPIN ON THAT. THEY'RE SAYING, "OH, WELL, HE'S
26 DISCLOSING CONFIDENTIAL INFORMATION." HE'S NOT. HE'S

1 SUMMARIZING THE FIFTH -- I'LL SLOW DOWN. HE'S SUMMARIZING THE
2 FIFTH AMENDED COMPLAINT. AND HE IS SAYING, "I HAVE ALL OF
3 THESE DOCUMENTS."

4 THE COURT: THANK YOU. VERY BRIEFLY.

5 MS. MEHTA: VERY BRIEFLY, YES, YOUR HONOR. THANK
6 YOU. I JUST WANT TO ADDRESS PARAGRAPH 16 ARGUMENT. WE KEEP
7 COMING BACK TO IT. IT'S COMPLETELY IRRELEVANT. AND THE
8 REASON IT'S IRRELEVANT IS EVEN IF YOU WERE TO ACCEPT THE
9 ARGUMENT WHICH IS FLAWED ON ITS FACE BASED ON A FLAWED READING
10 OF PARAGRAPH 16 AND COMPLETE MISUNDERSTANDING OF THE RECORD,
11 INCLUDING THE FACT THAT WE DID -- FACEBOOK DID WRITE TO THE
12 PARLIAMENT BETWEEN THE TIME WE GOT NOTICE AND TWO DAYS LATER
13 WHEN WE TURNED THIS OVER.

14 WE IN FACT DID REACH OUT TO PARLIAMENT AND SAY,
15 "THIS IS IMPROPER. IT'S SUBJECT TO THE PROTECTIVE ORDER."
16 SET ALL OF THAT ASIDE EVEN ACCEPTING THEIR ARGUMENT ON
17 PARAGRAPH 16, THERE'S STILL BEEN NO ANSWER AS TO WHY
18 MR. KRAMER HAD ACCESS TO HIGHLY CONFIDENTIAL INFORMATION WHICH
19 IS ITSELF A VIOLATION OF THE PROTECTIVE ORDER. IT HAD NOTHING
20 TO DO WITH PARAGRAPH 16.

21 AND THERE'S BEEN NO EXPLANATION OR EVEN
22 ACKNOWLEDGMENT OF YOUR HONOR'S NOVEMBER 20TH ORDER WHICH SAID
23 FORGET THE PROTECTIVE ORDER WHICH SAID MR. KRAMER SHALL NOT
24 TURN THESE DOCUMENTS OVER TO THE DCMS. IT DOESN'T MATTER WHAT
25 PARAGRAPH 16 SAYS. THERE WAS THOSE COMPLETELY INDEPENDENT
26 VIOLATIONS OF THE COURT ORDERS, ADD TO THAT THEN EXCUSE ON

1 PARAGRAPH 16 IS FLAWED. PARAGRAPH 16.

2 THE COURT: THANK YOU, MS. MEHTA. THIS COURT IS
3 GOING TO TAKE A RECESS ON THIS MATTER. THIS IS A CASE AND A
4 MOTION IN PARTICULAR THAT IS OF IMMENSE IMPORTANCE. AND I'M
5 GOING TO BE ISSUING AN ORDER TODAY ON THIS IN THE PRESENCE OF
6 COUNSEL. THERE MAY BE MORE THINGS THAT YOU MAY WISH TO
7 COMMENT ON BEFORE I ISSUE AN ORDER.

8 BUT WE'RE GOING TO TAKE A BREAK RIGHT NOW FOR LUNCH
9 AND WE WILL RECONVENE AT 2:00 O'CLOCK THIS AFTERNOON. THE
10 COURT IS IN RECESS UNTIL 2:00 P.M. THANK YOU VERY MUCH,
11 EVERYONE.

12 (WHEREUPON, A RECESS WAS TAKEN.)

13 THE COURT: ALL RIGHT. WE ARE BACK ON THE RECORD.
14 THE RECORD SHALL REFLECT THAT ALL COUNSEL ARE PRESENT IN THE
15 COURTROOM. AND MR. GODKIN?

16 MR. GODKIN: YES, YOUR HONOR. I'M HERE.

17 THE COURT: VERY WELL. MR. GODKIN IS ALSO PRESENT
18 ON THE TELEPHONE. WERE THERE ANY OTHER COMMENTS BEFORE THE
19 COURT RENDERS ITS DECISION?

20 MR. RUSSO: YOUR HONOR, JUST ONE POINT. YOU
21 MENTIONED THE FACT THAT MR. KRAMER TURNED OVER THE DOCUMENTS.
22 HE WAS UNDER A CONTEMPT CITATION BY PARLIAMENT AT THE TIME.
23 IT WAS NOT JUST THAT HE HAD BEEN SERVED A SUBPOENA. THEY HAD
24 ACTUALLY GIVEN HIM NOTICE THAT HE WAS IN CONTEMPT OF THAT
25 ORDER AT THE TIME THAT HE DID THAT TURNOVER. THANK YOU.

26 MR. LERNER: IF THERE WAS A CONTEMPT ORDER, IT

1 HASN'T BEEN PRODUCED TO US OR TO THE COURT. AND WHAT WAS JUST
2 STATED IS NOT IN FACT THE CASE.

3 THE COURT: THANK YOU. THE COURT HAS READ AND
4 CONSIDERED THE MOVING PAPERS AND THE OPPOSITION PAPERS. THE
5 COURT HAS ALSO CONSIDERED THE ARGUMENTS OF COUNSEL. AND UPON
6 DUE CONSIDERATION OF THOSE BRIEFS AND THE EVIDENCE AND COUNSEL
7 AND THE ORAL ARGUMENTS AND HAVING TAKEN THIS MATTER UNDER
8 SUBMISSION, THE COURT IS HEREBY ORDERING IN ITS DISCRETION
9 THAT IT SUA SPONTE RECONSIDERS ITS RULING ON THE RECORD ON
10 DECEMBER 17TH, 2018, IN VACATING ITS PRIOR QUOTE "ORDER
11 REOPENING DISCOVERY FOR THE LIMITED PURPOSE OF INVESTIGATING
12 THE BREACH OF THE COURT ORDERS." CLOSE QUOTE.

13 AND MEMORIALIZED IN THE ORDER RE DISCOVERY ISSUED
14 JANUARY 16TH, 2019, IN LIGHT OF NEW FACTS PRESENTED IN THIS
15 MOTION. THAT'S PURSUANT TO CODE OF CIVIL PROCEDURE SECTION
16 10008(C) .

17 THE LEAKS OF SEALED STRICKEN COURT FILINGS AND
18 CONFIDENTIAL DOCUMENTS ATTACHED OUTSIDE OF DCMS PUBLICATION
19 HAVE CONTINUED. WITH REGARD TO THE CRIME-FRAUD EXCEPTION,
20 FACEBOOK HAS MADE A PRIMA FACIE SHOWING THAT THE CRIME-FRAUD
21 EXCEPTION APPLIES BASED UPON THE INSTANT FACTS.

22 THE COURT HAS RECITED CITATIONS TO CASE LAW. AND I
23 HAVE A DECISION THAT IS 14 PAGES LONG HERE TODAY. WE COULD
24 SIT AND CREATE A RECORD WITH REGARD TO THIS DECISION OR I
25 COULD JUST ISSUE A SUMMARY OF WHAT I'M ORDERING. AND HOW
26 WOULD THE PARTIES LIKE THE COURT TO PROCEED?

1 MR. MURPHY: YOUR HONOR, FROM MY CLIENT'S
2 STANDPOINT, A SUMMARY WOULD BE FINE. DOES THE ORDER SPECIFY
3 THE PRIMA FACIE FRAUD OR CRIME? BECAUSE THE EXCEPTION IS VERY
4 LIMITED AND IT DOESN'T APPLY TO ALL COMMUNICATION. YOU
5 KNOW -- I'M SORRY, COUNSEL. I'M SPEAKING.

6 MS. MEHTA: I'M NOT SAYING ANYTHING. I'M WAITING
7 FOR YOU.

8 MR. MURPHY: THE EXCEPTION IS VERY LIMITED AND
9 APPLIES ONLY TO THOSE COMMUNICATIONS THAT ARE REASONABLY
10 RELATED TO THE ALLEGED CRIME OF FRAUD, SO I THINK THE CRIME OF
11 FRAUD HAS TO BE DEFINED. I ASSUME IT'S DEFINED IN THE ORDER.

12 THE COURT: ALL RIGHT. I UNDERSTAND, MR. MURPHY.
13 I'M GOING TO READ THE ORDER.

14 MR. MURPHY: OKAY.

15 THE COURT: "FACEBOOK HAS MADE A PRIMA FACIE SHOWING
16 THAT THE CRIME-FRAUD EXCEPTION APPLIES BASED ON THE INSTANT
17 FACTS. EVIDENCE CODE SECTION 956 CODIFIES THE COMMON LAW RULE
18 THAT THE PRIVILEGE PROTECTING CONFIDENTIAL ATTORNEY-CLIENT
19 COMMUNICATIONS IS LOST IF THE CLIENT SEEKS LEGAL ASSISTANCE TO
20 PLAN OR PERPETRATE A CRIME OR FRAUD. THE CRIME-FRAUD
21 EXCEPTION EXPRESSLY APPLIES TO COMMUNICATIONS ORDINARILY
22 SHIELDED BY THE ATTORNEY-CLIENT PRIVILEGE. THIS IS SET FORTH
23 IN EVIDENCE CODE SECTION 954.

24 AND ALSO THE BP ALASKA EXPLORATION, INC. CASE VS.
25 SUPERIOR COURT A 1988 CASE FOUND AT 199 CAL.APP.3RD 1240 AT
26 1249.

1 TO INVOKE THE CRIME-FRAUD EXCEPTION, THE PROPONENT
2 MUST MAKE A PRIMA FACIE SHOWING THAT THE SERVICES OF THE
3 ATTORNEY WERE SOUGHT OR OBTAINED TO AID SOMEONE IN COMMITTING
4 A CRIME OR FRAUD. EVIDENCE CODE SECTION 956 DOES NOT REQUIRE
5 A COMPLETED CRIME OR FRAUD. IT APPLIES TO ATTORNEY
6 COMMUNICATIONS SOUGHT TO ENABLE THE CLIENT TO PLAN TO COMMIT A
7 FRAUD, WHETHER THE FRAUD IS SUCCESSFUL OR NOT. IT IS THE
8 INTENT OF THE CLIENT UPON WHICH ATTENTION MUST BE FOCUSED AND
9 NOT THAT OF THE LAWYERS.

10 THAT'S FOUND AT FAVILA V. KATTEN MUCHIN ROSENMAN,
11 LLP. A 2010 CASE FOUND AT 188 CAL. APP. 4TH 189 AT 220.

12 PLAINTIFF SIX4THREE, LLC'S CONTENTION THAT "FACEBOOK
13 HAS TAKEN A HANDFUL OF QUOTATIONS OUT OF CONTEXT IN AN ATTEMPT
14 TO SPIN A NARRATIVE THAT SIX4THREE AND ITS COUNSEL HAVE
15 PLOTTED FOR YEARS TO REVEAL FACEBOOK'S CONFIDENTIAL
16 INFORMATION, NOTWITHSTANDING THE PROTECTIVE ORDER" IS BELIED
17 BY THE EVIDENCE SUBMITTED IN SUPPORT OF THIS MOTION AS
18 DISCUSSED INFRA.

19 FURTHERMORE, MR. GODKIN'S STATEMENT THAT QUOTE "THE
20 SUMMARY OF SIX4THREE'S PUBLICLY-FILED FIFTH AMENDED COMPLAINT
21 THAT MY FIRM SENT TO VARIOUS MEDIA AND GOVERNMENT ENTITIES
22 SUMMARIZES THE COMPLAINT'S ALLEGATIONS AND CITES TO THE FIFTH
23 AMENDED COMPLAINT" CLOSE QUOTE IS EQUALLY NOT WELL TAKEN AS
24 DISCUSSED HEREIN.

25 SIX4THREE'S OPPOSITION FILED ON FEBRUARY 27, 2019,
26 PARAGRAPH 8. THE DECLARATION IN SUPPORT OF THAT OPPOSITION IS

1 MY CITATION.

2 IT IS UNDISPUTED THAT CERTAIN INFORMATION PRODUCED
3 IN THIS ACTION ARE SUBJECT TO A STIPULATED PROTECTIVE ORDER.
4 SPECIFICALLY, THE PARTIES STIPULATED. AND I QUOTE "ANY
5 PERSONS RECEIVING CONFIDENTIAL INFORMATION OR HIGHLY
6 CONFIDENTIAL INFORMATION SHALL NOT REVEAL OR DISCUSS SUCH
7 INFORMATION TO OR WITH ANY PERSON WHO IS NOT ENTITLED TO
8 RECEIVE SUCH INFORMATION, EXCEPT AS SET FORTH HEREIN."

9 FACEBOOK BEGAN PRODUCING QUOTE "DOCUMENTS MARKED
10 QUOTE 'CONFIDENTIAL' AND QUOTE 'HIGHLY CONFIDENTIAL' CLOSE
11 QUOTE IN DECEMBER 2016. AND THAT'S FOUND IN GODKIN
12 DECLARATION AT PARAGRAPH 5.

13 COUNSEL FOR SIX4THREE HAVE MADE MULTIPLE
14 REPRESENTATIONS TO THE COURT THAT QUOTE "THERE HAVE BEEN NO
15 COMMUNICATIONS WITH THIRD PARTIES REGARDING FACEBOOK'S
16 CONFIDENTIAL INFORMATION." PERIOD CLOSE QUOTE.

17 SEE ALSO THE GODKIN DECLARATION IN SUPPORT OF GODKIN
18 RESPONSE TO EX PARTE FILED FEBRUARY 28, 2019, PARAGRAPH 5.
19 AND PARENTHETICALLY QUOTE ("B&G ONLY PROVIDED THIRD PARTIES
20 WITH FACEBOOK'S CONFIDENTIAL OR HIGHLY CONFIDENTIAL
21 INFORMATION IN CONFORMANCE WITH THE PROTECTIVE ORDER".) CLOSE
22 QUOTE PERIOD CLOSE PARENS.

23 THESE STATEMENTS ARE DIRECTLY CONTRADICTED BY THE
24 COMMUNICATIONS SIX4THREE AND ITS COUNSEL HAD WITH THIRD
25 PARTIES. THE SUMMARIES AT ISSUE NOT ONLY SUMMARIZED THE
26 ALLEGATIONS, BUT ALSO ANALYZE IN DETAIL THE CONFIDENTIAL

1 INFORMATION OBTAINED FROM FACEBOOK. FOR INSTANCE, IN AN EMAIL
2 EXCHANGE INITIATED BY MR. GODKIN TO THE INFORMATION
3 COMMISSIONER'S OFFICE, OTHERWISE KNOWN AS THE ICO, WITH THE
4 SUBJECT LINE, QUOTE "EXTENSIVE EVIDENCE REGARDING FACEBOOK'S
5 TREATMENT OF FRIEND DATA AND USER PRIVACY," COMMA CLOSE QUOTE
6 MR. GODKIN INTRODUCED HIMSELF AND STATED THAT HE AND HIS FIRM
7 HAD QUOTE "OBTAINED EXTENSIVE DISCOVERY OF COMMUNICATIONS
8 BETWEEN ZUCKERBERG AND NUMEROUS EXECUTIVES. THAT THEY BELIEVE
9 IS HIGHLY RELEVANT TO THE CAMBRIDGE ANALYTICA INVESTIGATION."
10 PERIOD CLOSE QUOTE.

11 AND THESE ARE FROM VARIOUS SOURCES. THIS IS THE
12 MILLER DECLARATION IN SUPPORT OF THE MOTION AT EXHIBIT 2 BATES
13 NO. BG001353. SEE ALSO SAME EXHIBIT 12 FROM THAT DECLARATION.
14 BATES NO. BG000152; EXHIBIT 13, BG000154; EXHIBIT 14,
15 BG000156; EXHIBIT 24, BG001330; EXHIBIT 25, BG001357;
16 EXHIBIT 26, BG001825.

17 NOTABLY, MR. GODKIN INITIATED THE EMAIL EXCHANGES TO
18 NUMBER ONE, CALIFORNIA LEGISLATURES -- LEGISLATORS I SHOULD
19 SAY. NUMBER TWO , THE OREGON DEPARTMENT OF JUSTICE. NUMBER
20 THREE, STATE OF MASSACHUSETTS AND, FOUR, FEDERAL TRADE
21 COMMISSION. ALL OF THOSE DISCLOSURES ARE SUPPORTED BY BATES
22 NUMBERS AND EXHIBITS. AND THOSE ARE NOTATED IN THE ORDER.

23 IN THE EMAIL, SIX4THREE'S COUNSEL EXPLICITLY WRITES
24 THAT THE SUMMARY IS ONE OF EVIDENCE AND NOT THE ALLEGATIONS.
25 ON THEIR FACE, THESE EMAILS DEMONSTRATE THAT THE SUMMARY WENT
26 BEYOND THE FOUR CORNERS OF THE FIFTH AMENDED COMPLAINT, AND

1 INCLUDED COUNSEL'S OWN IMPRESSIONS AND ANALYSIS OF FACEBOOK'S
2 CONFIDENTIAL INFORMATION INCLUDED IN THE SUMMARY. COUNSEL
3 WENT FURTHER BY INVITING THE RECIPIENT TO FIND AN QUOTE
4 "APPROPRIATE MECHANISM" CLOSE QUOTE TO PERMIT DISCLOSURE.

5 QUOTE "THIS SUMMARY DOES NOT DO THE WEALTH OF
6 EVIDENCE WE HAVE OBTAINED JUSTICE, WHICH IS WHY I'M HOPING WE
7 CAN SPEAK WITH YOUR OFFICE TO DETERMINE IF THERE IS AN
8 APPROPRIATE MECHANISM FOR YOUR TEAM TO EVALUATE THE EVIDENCE
9 YOURSELVES."

10 THIS IS FROM THE MILLER DECLARATION AT EXHIBIT 2,
11 BATES NO. BG001353. SEE ALSO EXHIBIT 12, BATES NO. BG000152;
12 EXHIBIT 13, BG000154; EXHIBIT 14, BG000156; EXHIBIT 24,
13 BG001330; EXHIBIT 25, BG001357; EXHIBIT 26, BG001825.

14 THE SUMMARY ALSO SUMMARIZES THE CONTENTS OF QUOTE
15 "INTERNAL EMAILS." PERIOD CLOSE QUOTE. THE CLOSING PARAGRAPH
16 OF THAT EMAIL FURTHER DEMONSTRATES THE SUMMARY REVEALED OR
17 DISCUSSED CONFIDENTIAL INFORMATION OBTAINED FROM FACEBOOK AND
18 NOT THE ALLEGATIONS OF ANY COMPLAINT.

19 QUOTE "AS YOU CAN SEE, THERE IS A LOT HERE AND IT
20 WOULD TAKE MONTHS OR EVEN YEARS FOR THE ICO TO OBTAIN
21 DISCOVERY OF THIS INFORMATION FROM FACEBOOK. PERIOD. WE HOPE
22 TO IDENTIFY AN APPROPRIATE MECHANISM FOR YOUR TEAM TO ACCESS
23 IT AND DETERMINE ITS RELEVANCE TO YOUR CURRENT EFFORTS.
24 PERIOD CLOSE QUOTE.

25 THAT'S FROM THE EXHIBITS TO THE MILLER DECLARATION.
26 EXHIBIT 2, BATES NO. BG001353. SEE ALSO EXHIBIT 12, BATES

1 NO. BG000152; EXHIBIT 13, BG000154; EXHIBIT 14, BG000156;
2 EXHIBIT 24, BG001330; EXHIBIT 25, BG001357; EXHIBIT 26,
3 BG001825.

4 LASTLY, THE SUMMARY DOES NOT CITE TO THE PARAGRAPHS
5 OF THE FIFTH AMENDED COMPLAINT AS ASSERTED BY SIX4THREE
6 COMPARED TO SIX4THREE OPPOSITION AT PAGE 5, LINES 9 THROUGH 12
7 WITH THE MILLER DECLARATION AT EXHIBIT 2. AND THE DOCUMENTS
8 NUMBERS BG001353; EXHIBIT 12, BATES NO. BG000152; EXHIBIT 13,
9 BG000154; EXHIBIT 14, BG000156; EXHIBIT 24, BG001330;
10 EXHIBIT 25, BG001357; EXHIBIT 26, BG001825.

11 IN ADDITION TO THE SUMMARY OF EVIDENCE, SEVERAL
12 WRITTEN COMMUNICATIONS HAVE BEEN PRODUCED BY SIX4THREE'S
13 COUNSEL PURSUANT TO STIPULATION THAT INVOLVED SIX4THREE, ITS
14 PRINCIPAL MR. KRAMER, AND ITS COUNSEL, INCLUDING MR. GODKIN,
15 MR. GROSS, MR. KRUZER, AND MR. SCARAMELLINO, REVEALING OR
16 DISCUSSING CONFIDENTIAL INFORMATION PRODUCED BY FACEBOOK WITH
17 THIRD PARTIES AND USING A RETAINED EXPERT AS A SOURCE FOR THE
18 NEWS MEDIA AS FOLLOWS:

19 QUOTE "WE HAVE UNCOVERED EVIDENCE SUPPORTING THESE
20 CLAIMS AND BELIEVE FACEBOOK'S CONDUCT ALSO INCLUDES
21 COMPETITIVE RESTRICTIONS AGAINST OVER 40,000 SOFTWARE
22 APPLICATIONS" CLOSE QUOTE. THAT'S THE MILLER DECLARATION AT
23 EXHIBIT 3 AND THE DOCUMENT IS 64300015917.

24 NUMBER TWO, QUOTE "THERE IS AN OPPORTUNITY TO UNSEAL
25 ABOUT 3,000 PAGES OF HOT DOCUMENTS THAT WE BELIEVE VERY
26 CLEARLY PROVE THE ALLEGATIONS IN OUR COMPLAINT" CLOSE QUOTE.

1 THAT'S FOUND AT THE MILLER DECLARATION AT EXHIBIT 6, DOCUMENT
2 NO. BG001308.

3 NUMBER THREE, QUOTE "WE ARE EXTREMELY EAGER TO DO
4 THE STORY NOW THAT THERE IS AN OPPORTUNITY FOR THE DOCUMENTS
5 TO BE RELEASED. I UNDERSTAND THAT COLLINS SAID THAT WILL
6 HAPPEN IN A WEEK, BUT I'M SURE THEY COULD LEAK BEFORE AND OF
7 COURSE WE WANT TO BE THE FIRST. PERIOD.

8 THE CHALLENGE IS THAT UNTIL NOW WE HAVE ONLY TALKED
9 OFF THE RECORD, SO IT WILL BE HARD TO USE MATERIAL FROM OUR
10 CONVERSATIONS IF I DON'T HEAR FROM YOU." PERIOD CLOSE QUOTE.
11 THAT'S THE MILLER DECLARATION AT EXHIBIT 15, DOCUMENT
12 NO. BG000716.

13 NUMBER FOUR, QUOTE, "WE HAVE OBTAINED EMAILS FROM
14 ZUCKERBERG AND NUMEROUS OTHER FACEBOOK EXECUTIVES AND
15 EMPLOYEES." CLOSE QUOTE. THE MILLER DECLARATION AT
16 EXHIBIT 16, DOCUMENT NO. BG000425. AND NUMBER FIVE, QUOTE
17 "THE KEY THING WITH, REDACTED, IS THAT IF THE ARTICLE
18 IDENTIFIES HIM AS AN EXPERT WITNESS OR BASIS HIS CONFIRMATION
19 OF THE ALLEGATIONS ON THE FACT THAT HE HAS REVIEWED THE
20 EVIDENCE..." ELLIPSES CLOSE QUOTE. THAT'S FOUND AT THE MILLER
21 DECLARATION AT EXHIBIT 19, DOCUMENT BG0006403 AND SEE
22 EXHIBIT 18, BG006394.

23 NOTABLY, SIX4THREE POSITS NO ARGUMENT OR CITATION TO
24 EVIDENCE THAT THE REFERENCES TO THE EVIDENCE MADE IN THESE
25 COMMUNICATIONS CAME FROM NON-CONFIDENTIAL INFORMATION OR
26 SOURCES. FURTHERMORE, THESE COMMUNICATIONS WERE MOSTLY MADE

1 PRIOR TO MR. KRAMER'S DISCLOSURE TO THE DCMS OR BEFORE DCMS
2 PUBLICATION. SEE SIX4THREE OPPOSITION AT PAGE 4, LINES 6
3 THROUGH 8. THE EXCEPTION IS MILLER DECLARATION, EXHIBIT 15,
4 WHICH IS A COMMUNICATION BETWEEN THE WASHINGTON POST AND
5 SIX4THREE AND ITS COUNSEL MADE AFTER MR. KRAMER'S DISCLOSURE
6 BUT BEFORE DCMS PUBLICATION.

7 TO THAT END, MR. GROSS' ATTEMPT TO MINIMIZE HIS
8 PARTICIPATION IN THESE COMMUNICATIONS IS NOT WELL TAKEN. SEE
9 SIX4THREE'S OPPOSITION AT PAGE 6, LINES 10 THROUGH 21.

10 FIRST, MR. GROSS STATED HIS FIRM GROSS & KLEIN LLP,
11 IS CONTRACTUALLY OBLIGATED TO FOLLOW THE DIRECTION OF LEAD
12 COUNSEL BIRNBAUM AND GODKIN, LLP IN THIS ACTION. IN ITS
13 RETAINER AGREEMENT WITH SIX4THREE QUOTE "THE CLIENT
14 ACKNOWLEDGES THAT ANY ACTION TAKEN FROM THE FIRM OR BY THE
15 FIRM WILL BE AT THE DIRECTION OF BIRNBAUM AND GODKIN, LLP
16 PARENTHESES QUOTE ("LEAD COUNSEL"). CLOSE QUOTE CLOSE PARENS.

17 ITS ROLE AS LOCAL COUNSEL, THE FIRM WILL NOT BE
18 RESPONSIBLE FOR DEVELOPING LEGAL STRATEGY, IMPLEMENTING LEGAL
19 STRATEGY, MONITORING FILING DEADLINES, OR OTHERWISE DIRECTING
20 THE LITIGATION. IF, AT ANY POINT IN THE CLIENT'S
21 REPRESENTATION BY THE FIRM, THE CLIENT WOULD LIKE TO MODIFY
22 THIS SCOPE OF REPRESENTATION, THE CLIENT SHALL ADVISE THE FIRM
23 AND A NEW RETAINER AGREEMENT SHALL BE NEGOTIATED.

24 THIS IS FROM THE GROSS DECLARATION IN SUPPORT OF THE
25 MOTION TO WITHDRAW FILED JANUARY 24, 2019. MR. GROSS STATES
26 THAT THE RETAINER AGREEMENT WAS NEVER MODIFIED. ACCORDINGLY,

1 ANY COMMUNICATIONS WITH SIX4THREE WOULD HAVE BEEN AT THE
2 BEHEST OF BIRNBAUM & GODKIN. ON NOVEMBER 27TH, 2018,
3 MR. GROSS WAS CC:ED ON AN EMAIL FROM THE WASHINGTON POST AND
4 TO MR. KRAMER, PRINCIPAL OF SIX4THREE, AND MR. SCARAMELLINO, A
5 MEMBER OF SIX4THREE'S LEGAL TEAM, WHEREIN THE AUTHOR STATED,
6 AND I QUOTE "I'M GETTING A BIT WORRIED SINCE I HAVE NOT HEARD
7 FROM YOU IN SEVERAL DAYS. PERIOD. WE ARE EXTREMELY EAGER TO
8 DO THE STORY NOW THAT THERE'S AN OPPORTUNITY FOR THE DOCUMENTS
9 TO BE RELEASED. I UNDERSTAND THAT COLLINS SAID THAT WILL
10 HAPPEN IN A WEEK, BUT I'M SURE THEY COULD LEAK BEFORE -- AND
11 OF COURSE WE WANT TO BE THE FIRST. PERIOD. THE CHALLENGE IS
12 THAT UNTIL NOW WE HAVE ONLY TALKED OFF THE RECORD, SO IT WILL
13 BE HARD TO USE MATERIAL FROM OUR CONVERSATIONS IF I DON'T HEAR
14 FROM YOU. PERIOD. IN ADDITION, THE TROVE IS BIG AS WE KNOW,
15 AND I KNOW YOU HAD PROMISED TO OFFER SOME GUIDANCE ON HOW TO
16 GO THROUGH IT. PERIOD. I WOULD REALLY APPRECIATE IF YOU
17 COULD LET ME KNOW WHAT IS HAPPENING EITHER WAY -- EVEN IF IT
18 IS TO SAY THAT YOU CAN'T SPEAK. YOU CAN REACH ME ON MY CELL
19 OR ON SIGNAL AT -- AND THAT IS REDACTED.

20 THERE IS A CITATION TO THIS AND UNLESS IT'S
21 NECESSARY I'M NOT GOING TO READ THE CITATION. IT'S IN THE
22 ORDER.

23 NOTABLY, SIX4THREE DOES NOT POSIT ARGUMENT AND
24 MR. GROSS DOES NOT STATE IN THE DECLARATION THAT HE DID NOT
25 RECEIVE OR READ THAT EMAIL. SIX4THREE DID NOT FILE OBJECTIONS
26 TO THE EVIDENCE PROFFERED BY FACEBOOK. THIS EMAIL

1 DEMONSTRATES THAT THERE WERE CONVERSATIONS WITH THE THIRD
2 PARTY PRIOR TO DCMS PUBLICATION REVEALING OR DISCUSSING
3 FACEBOOK'S CONFIDENTIAL INFORMATION UPON WHICH MR. GROSS WAS A
4 RECIPIENT TO ALL OR PART OF THOSE COMMUNICATIONS. ALTHOUGH
5 MR. GROSS WAS CONTRACTUALLY RESPONSIBLE FOR SUBMITTING TO THE
6 EFFORTS OF BIRNBAUM & GODKIN, LLP AS LEAD COUNSEL, MR. GROSS
7 NEVERTHELESS HAD AN INDEPENDENT DUTY AS LOCAL COUNSEL.

8 FURTHERMORE, FROM THE OUTSET OF HIS FIRM'S RETENTION
9 BY SIX4THREE, MR. GODKIN REQUIRED MR. SCARAMELLINO TO WORK ON
10 SIX4THREE'S LEGAL TEAM.

11 QUOTE "MR. SCARAMELLINO, MR. KRAMER AND I RECOGNIZED
12 THAT FILING A LAWSUIT AGAINST FACEBOOK WOULD REQUIRE
13 SUBSTANTIAL LEGAL RESOURCES. PERIOD. BECAUSE MY FIRM IS
14 SMALL, AND BECAUSE SIX4THREE IS A DEFUNCT STARTUP WITH VERY
15 LIMITED RESOURCES, I CONCLUDED THAT IT WOULD BE APPROPRIATE
16 AND HELPFUL FOR MR. SCARAMELLINO TO WORK WITH ME AND MY FIRM
17 AS PART OF THE LEGAL TEAM. AS SUCH, MR. SCARAMELLINO'S
18 AGREEMENT TO WORK WITH ME ON THE LITIGATION TEAM WAS A
19 CONDITION OF BIRNBAUM AND GODKIN'S ENGAGEMENT WITH SIX4THREE.

20 MR. GODKIN HAS PREVIOUSLY ADVISED THE COURT OF HIS
21 DIRECT SUPERVISION OVER MR. SCARAMELLINO IN THIS ACTION.

22 QUOTE "ACCORDINGLY, MR. SCARAMELLINO HAS BEEN
23 WORKING WITH ME AND MY FIRM AS A MEMBER OF THE LEGAL TEAM
24 SINCE MY FIRM WAS RETAINED BY SIX4THREE, WITH SIX4THREE'S
25 KNOWLEDGE -- STRIKE THAT. WITH SIX4THREE'S FULL KNOWLEDGE AND
26 APPROVAL. MR. SCARAMELLINO IS PERFORMING LEGAL RESEARCH, FACT

1 INVESTIGATION, ASSEMBLY OF DATA AND INFORMATION, AND
2 PREPARATION OF PLEADINGS, AND ANY OTHER WORK THAT I DECIDE
3 WILL ASSIST ME AND MY FIRM IN CARRYING OUT THE REPRESENTATION
4 OF SIX4THREE. ALL OF THE TASKS PERFORMED BY MR. SCARAMELLINO
5 ARE PERFORMED AT MY DIRECTION AND UNDER MY SUPERVISION.
6 PERIOD. ALL OF THE WORK PERFORMED BY MR. SCARAMELLINO HAS
7 BEEN REVIEWED BY ME OR ANOTHER ATTORNEY AT MY FIRM, AND MERGED
8 INTO MY FIRM'S WORK PRODUCT PERIOD. MR. SCARAMELLINO IS NOT
9 BEING PAID FOR HIS WORK. HIS ROLE IS AKIN TO THAT OF A LAW
10 CLERK OR PARALEGAL, SIMILAR TO HIS ROLES AT DAVIS POLK AND THE
11 SOUTHERN DISTRICT OF NEW YORK.

12 THE CONDUCT OF MR. SCARAMELLINO IN THIS ACTION --
13 AND THAT'S THE END OF THE QUOTE.

14 THE CONDUCT OF MR. SCARAMELLINO IN THIS ACTION IS
15 IMPUTED ON BIRNBAUM & GODKIN, LLP GIVEN WHAT I HAVE JUST READ
16 TO YOU.

17 MOREOVER, THESE COMMUNICATIONS WITH THIRD PARTIES
18 FALL OUTSIDE OF THE AMBIT OF RULES OF PROFESSIONAL CONDUCT,
19 RULE 3.6(B) (1) - (5). RATHER, RULE 3.6 PERMITS THE LAWYER TO
20 STATE: COLLON

21 ONE, THE CLAIM, OFFENSE OR DEFENSE INVOLVED AND,
22 EXCEPT WHEN PROHIBITED BY LAW, THE IDENTITY OF THE PERSON'S
23 INVOLVED.

24 TWO, INFORMATION CONTAINED IN A PUBLIC RECORD.

25 THREE, THAT AN INVESTIGATION OF A MATTER IS IN
26 PROGRESS.

1 FOUR, THE SCHEDULING OR RESULT OF ANY STEP IN
2 LITIGATION.

3 AND, FIVE, A REQUEST FOR ASSISTANCE IN OBTAINING
4 EVIDENCE AND INFORMATION NECESSARY THERETO. THAT'S FROM THE
5 RULES OF PROFESSIONAL CONDUCT 3.6(B) (1) - (5) .

6 THE AFOREMENTIONED EMAILS OF SIX4THREE'S COUNSEL
7 DEMONSTRATES THAT COUNSEL'S SUMMARY OF EVIDENCE TO THIRD
8 PARTIES EXCEEDS THE SCOPE OF THIS RULE.

9 THE EVIDENCE REFLECTS THAT SIX4THREE THROUGH ITS
10 PRINCIPAL MR. KRAMER UTILIZED THE SERVICES OF COUNSEL TO AID
11 IN COMMITTING A CRIME OR FRAUD. PERIOD. PRIOR TO TRAVELING
12 TO THE UNITED KINGDOM WITH DOCUMENTS CONTAINED -- CONTAINING
13 FACEBOOK'S CONFIDENTIAL INFORMATION, MR. KRAMER COMMUNICATED
14 WITH MR. COLLINS ON FINDING AN QUOTE "APPROPRIATE MECHANISM"
15 CLOSE QUOTE TO DISCLOSE TO DCMS SIMILAR TO THE COMMUNICATIONS
16 OF SIX4THREE'S COUNSEL TO TARGET THIRD PARTIES.

17 ON OCTOBER 1ST, 2018, MR. KRAMER INITIATED A
18 COMMUNICATION TO MR. COLLINS BY WAY OF AN EMAIL WITH THE
19 SUBJECT LINE QUOTE "EXTENSIVE EVIDENCE RELEVANT TO FACEBOOK'S
20 DATA AND PRIVACY ABUSES." PERIOD CLOSE QUOTE. ALTHOUGH
21 MR. KRAMER STATED THAT HE WAS QUOTE "SUMMARIZING THE PUBLIC
22 INFORMATION FROM OUR CASE" CLOSE QUOTE FOR MR. COLLINS, THE
23 SUMMARY IS ESSENTIALLY THE SAME ONE SENT BY SIX4THREE'S
24 COUNSEL.

25 ON NOVEMBER 3RD, 2018, IN RESPONSE MR. COLLINS
26 PROVIDED HIS PERSONAL EMAIL AND MOBILE PHONE NUMBER TO

1 MR. KRAMER. IN THAT SAME EMAIL, MR. COLLINS ALSO INQUIRED AS
2 TO THE DOCUMENTS IN MR. KRAMER'S POSSESSION. SPECIFICALLY
3 QUOTE "UNREDACTED COPY OF PLAINTIFF SIX4THREE'S CORRECTED
4 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
5 DEFENDANTS' SPECIAL MOTIONS TO STRIKE PARENTHESES (ANTI-SLAPP)
6 CLOSE PARENS FILED ON MAY 18TH, 2018.

7 THE UNREDACTED COPY OF THE DECLARATION OF
8 DAVID S. GODKIN IN SUPPORT OF SIX4THREE'S ANTI-SLAPP
9 OPPOSITION. THAT'S THE GODKIN ANTI-SLAPP DECLARATION FILED
10 CONCURRENTLY THEREWITH ON MAY 18TH, 2018.

11 EXHIBITS 1 THROUGH 212 TO THE GODKIN ANTI-SLAPP
12 DECLARATION FILED ON MAY 18TH, 2018.

13 ALL DOCUMENTS CONTAINING SUMMARIES OR ANALYSES OF
14 ANY OF THE EXHIBITS TO THE GODKIN ANTI-SLAPP DECLARATION FILED
15 ON MAY 18TH, 2018. PERIOD.

16 AND THAT'S FROM THE KRAMER DECLARATION EXHIBIT 2.
17 ON NOVEMBER 4TH, 2018, MR. KRAMER CONFIRMED HIS POSSESSION
18 AND SHARED HIS OWN PERSONAL VIEW OF THOSE DOCUMENTS.

19 QUOTE "THANKS FOR YOUR NOTE. I CAN CONFIRM THAT
20 YOUR DESCRIPTION OF THE DOCUMENTS IN MY POSSESSION IS
21 ACCURATE.

22 MY PERSONAL VIEW IS THAT THE DOCUMENTS YOU LIST IN
23 YOUR NOTE CONTAIN INFORMATION HIGHLY RELEVANT TO YOUR
24 INVESTIGATION REGARDING FACEBOOK'S DATA PRACTICES, AND FURTHER
25 THAT IT WOULD BE IMPOSSIBLE FOR THE INVESTIGATION TO REACH ANY
26 LEGITIMATE CONCLUSIONS WITHOUT A THOROUGH REVIEW OF THIS

1 INFORMATION." PERIOD CLOSE QUOTE.

2 MR. KRAMER ALSO INVITED MR. COLLINS TO START AN
3 QUOTE "APPROPRIATE MECHANISM" CLOSE QUOTE FOR DISCLOSURE, THE
4 CONVERSATION OF WHICH IMPLICATES SIX4THREE'S COUNSEL.

5 QUOTE, "THESE DOCUMENTS ARE SUBJECT TO
6 CONFIDENTIALITY UNDER A PROTECTIVE ORDER ENTERED IN SAN MATEO
7 SUPERIOR COURT IN CALIFORNIA. PERIOD. CAROL MENTIONED YOU
8 MAY BE SEEKING TO SUBPOENA THE DOCUMENTS. PERIOD. I WILL
9 AGREE TO ACCEPT SERVICE OF THE SUBPOENA MAILED TO MY HOME
10 ADDRESS." AND THAT'S REDACTED.

11 UPON RECEIPT OF ANY SUBPOENA, I WOULD BE REQUIRED TO
12 NOTIFY FACEBOOK. PERIOD. IF FACEBOOK WISHES TO PREVENT MY
13 COMPLIANCE, IT WILL NEED TO TAKE ACTION IN APPROPRIATE FORA.
14 IF YOU WISH TO SPEAK, IT IS BEST THAT WE SET UP A PHONE CALL
15 WITH A CONFERENCE LINE. WE ALWAYS HAVE A MEMBER OF OUR LEGAL
16 TEAM ON THE LINE TO ENSURE WE HAVE WITNESSES OF WHAT WAS
17 DISCUSSED IN THE EVENT FACEBOOK TAKES RETRIBUTIVE ACTION
18 AGAINST US. PERIOD.

19 APPROXIMATELY ONE WEEK -- AND THAT'S CLOSE QUOTE.
20 APPROXIMATELY ONE WEEK LATER ON NOVEMBER 12, 2018, MR. KRAMER
21 RESPONDED THAT HE COULD NOT QUOTE "VOLUNTARILY DISCLOSE" CLOSE
22 QUOTE THE DOCUMENTS. PERIOD.

23 ON NOVEMBER 13TH, 2018, MR. COLLINS EMAILED
24 MR. KRAMER QUOTE, "WOULD WE BE CLEAR TO PUBLISH WHAT YOU HAVE
25 ALREADY SENT TO US AS WRITTEN EVIDENCE WITHOUT THERE BEING ANY
26 REPERCUSSIONS FOR YOU? WHILST WE HAVE IMMUNITY, YOU STILL

1 NEED TO CONSIDER YOUR OWN POSITION." CLOSE QUOTE.

2 ON NOVEMBER 19TH, 2018, MR. KRAMER ARRIVED IN
3 LONDON. STILL LEFT UNEXPLAINED IS HOW SIX4THREE'S COUNSEL
4 CAUSED FACEBOOK'S CONFIDENTIAL INFORMATION AND HIGHLY
5 CONFIDENTIAL INFORMATION RECEIVED PURSUANT TO THE STIPULATED
6 PROTECTIVE ORDER TO BE UPLOADED AND AVAILABLE FOR VIEWING AND
7 DOWNLOAD ON ITS CLIENT, SIX4THREE'S DROPBOX ACCOUNT NO LATER
8 THAN OCTOBER 1ST, 2018. SIX4THREE'S COUNSEL ADMITS IT WAS
9 RESPONSIBLE FOR THE SAFEKEEPING OF THAT CONFIDENTIAL
10 INFORMATION.

11 THIS IS SOMETHING FROM THE NOVEMBER 30TH, 2018,
12 HEARING THAT I PRESIDED OVER.

13 "MR. GODKIN: YOUR HONOR, WHAT I LEARNED LAST WEEK
14 FOR THE FIRST TIME WAS THAT THE DOCUMENTS WOULD HAVE BEEN
15 PLACED ON SIX4THREE'S DROPBOX SYSTEM.

16 THE COURT: HOW?

17 MR. GODKIN: I DON'T KNOW.

18 THE COURT: WHY?

19 MR. GODKIN: I DON'T KNOW THAT EITHER. BUT THAT IS
20 PRECISELY THE PROBLEM HERE THAT HAS CAUSED US TO HAVE A
21 SERIOUS ISSUE. YOU'RE ABSOLUTELY RIGHT THAT THE -- THE
22 DOCUMENTS THAT WERE PRODUCED BY FACEBOOK IN MY UNDERSTANDING
23 HAVE ALWAYS BEEN COMPLETELY SECURE FROM MR. KRAMER. THE
24 MISTAKE THAT WAS MADE HERE WAS THAT PLEADINGS THAT WERE
25 REFERENCED THOSE DOCUMENTS HAD BEEN PLACED WITHOUT MY FIRM'S
26 KNOWLEDGE ONTO SIX4THREE'S DROPBOX SYSTEM. PERIOD. THAT IS I

1 BELIEVE WHERE THE MISTAKE WAS MADE. AND MY FIRM OBVIOUSLY HAS
2 TO TAKE RESPONSIBILITY FOR FAILING TO ADEQUATELY PROTECT THAT
3 FROM HAPPENING AND WE DO." PERIOD CLOSE QUOTE.

4 NOTABLY, IN A SUBSEQUENT DECLARATION, MR. GODKIN
5 ACKNOWLEDGES ONLY HIS FIRM AND ITS EMPLOYEES HAD ACCESS TO
6 FACEBOOK'S CONFIDENTIAL AND HIGHLY CONFIDENTIAL INFORMATION.
7 QUOTE, "MY FIRM HAS STORED AND MAINTAINED FACEBOOK'S
8 CONFIDENTIAL INFORMATION ON A PASSWORD-PROTECTED DOCUMENT
9 HOSTING PLATFORM (RELATIVITY) AND ON THE FIRM'S SECURE SERVER.
10 ONLY FIRM EMPLOYEES HAVE ACCESS TO THE FIRM'S SECURE SERVER.
11 THOMAS SCARAMELLINO ASSISTED WITH THE LITIGATION AS AN OUTSIDE
12 MEMBER OF THE LEGAL TEAM. HE WAS NOT GIVEN ACCESS TO THE
13 FIRM'S SECURE SERVER."

14 NOTABLY, MR. GODKIN DOES NOT STATE WHAT THE -- DOES
15 NOT STATE THE SECURITY OF HIS FIRM'S SERVER OR DOCUMENT
16 HOSTING PLATFORM HAS BEEN COMPROMISED. ONE CAN ONLY CONCLUDE
17 THAT BIRNBAUM & GODKIN CAUSED FACEBOOK'S CONFIDENTIAL AND
18 HIGHLY CONFIDENTIAL INFORMATION TO BE UPLOADED ON SIX4THREE'S
19 DROPBOX.

20 BASED ON THE FOREGOING, THE COURT FINDS THAT
21 FACEBOOK HAS MADE A PRIMA FACIE SHOWING THAT THE SERVICES OF
22 THE SIX4THREE'S COUNSEL WAS SOUGHT OR OBTAINED TO AID
23 SIX4THREE IN COMMITTING A CRIME OR FRAUD AND THE CRIME-FRAUD
24 EXCEPTION APPLIES.

25 NUMBER TWO, DEPOSITIONS OF SIX4THREE'S COUNSEL.
26 DESPITE BEING HIGHLY DISFAVORED, FACEBOOK HAS DEMONSTRATED THE

1 NECESSITY OF DEPOSING SIX4THREE'S COUNSEL AND MEMBERS OF ITS
2 LEGAL TEAM GIVEN THE INCONGRUITIES IN THEIR STATEMENTS WHEN
3 COMPARED TO THE EVIDENCE OF THEIR COMMUNICATIONS REVEALING OR
4 DISCUSSING CONFIDENTIAL INFORMATION WITH THIRD PARTIES AND
5 THEIR OVERALL HANDLING OF FACEBOOK'S CONFIDENTIAL INFORMATION.

6 AS A THRESHOLD MATTER, THERE IS EVIDENCE OF ORAL
7 COMMUNICATIONS OR ORAL CONVERSATIONS REVEALING OR DISCUSSING
8 FACEBOOK'S CONFIDENTIAL INFORMATION BETWEEN SIX4THREE'S
9 COUNSEL, ITS LEGAL TEAM, RETAINED EXPERTS, ITS PRINCIPAL
10 MR. KRAMER AND THIRD PARTIES IN CONTRAVENTION OF THESE
11 STIPULATED PROTECTIVE ORDER, PARAGRAPH 6, IN DOCUMENTS
12 PRODUCED BY BIRNBAUM & GODKIN, LLP PURSUANT TO STIPULATION.

13 QUOTE "NUMBER ONE, THE CHALLENGE IS THAT UNTIL NOW
14 WE HAVE ONLY TALKED OFF THE RECORD, SO IT WILL BE HARD TO USE
15 MATERIAL FROM OUR CONVERSATIONS IF I DON'T HEAR FROM YOU."
16 PERIOD CLOSE QUOTE. THAT'S FROM EXHIBIT 15, DOCUMENT NO.
17 BG000716.

18 NUMBER TWO, QUOTE "TED MENTIONED THAT [REDACTED] CAN
19 CONFIRM SOME OF OUR ALLEGATIONS IN THE COMPLAINT. PERIOD.
20 WHAT HE OR OTHERS BE WILLING TO DO SO ON THE RECORD? QUESTION
21 WE ARE VERY MUCH HOPING THAT THE FIRST REPORTING OF THIS CAN
22 VERIFY AT LEAST A SIGNIFICANT PORTION OF THE ALLEGATIONS TO
23 MITIGATE THE IMPACT OF FACEBOOK'S COUNTER PUNCH. SINCE WE
24 DON'T WANT TO REVEAL [REDACTED], WE ARE WONDERING WHO MIGHT
25 FILL THIS GAP." THE CROSS REFERENCES ARE IN THE ORDER.

26 NUMBER THREE, QUOTE "THE KEY THING HERE WITH

1 [REDACTED] IS THAT IF THE ARTICLE IDENTIFIES HIM AS AN EXPERT
2 WITNESSES OR BASIS HIS CONFIRMATION OF THE ALLEGATIONS ON THE
3 FACT THAT HE HAS REVIEWED THE EVIDENCE."

4 NUMBER FOUR, QUOTE "I THINK ANONYMOUS QUOTES FROM
5 [REDACTED] WOULD BE FINE SO LONG AS HE ISN'T IDENTIFIED AS AN
6 EXPERT WITNESS." CLOSE QUOTE.

7 NUMBER FIVE, IN RESPONSE TO AN EMAIL STATING QUOTE
8 "THE INVESTIGATION TEAM DIRECTLY DEALING WITH THE CAMBRIDGE
9 ANALYTICA/FACEBOOK FILE" CLOSE QUOTE WHO QUOTE "WILL BE IN
10 TOUCH SHORTLY," CLOSE QUOTE. MR. GODKIN RESPONDED, QUOTE "I
11 AM IN ARBITRATION FOR THE NEXT SEVERAL DAYS BUT AM COPYING MY
12 COLLEAGUE JIM KRUZER WHO I BELIEVE WILL BE IN THE OFFICE AND
13 CAN COORDINATE." CLOSE QUOTE.

14 NUMBER SIX, QUOTE "MANY THANKS FOR THE CALL JUST
15 NOW. PERIOD. PLEASE MEET DAVID GODKIN, LEAD COUNSEL IN THE
16 LITIGATION I MENTIONED." CLOSE QUOTE.

17 NUMBER SEVEN, IN RESPONSE TO AN EMAIL ASKING WHEN
18 QUOTE "THERE [IS] A GOOD TIME TOMORROW THAT [REDACTED] AND I
19 CAN TOUCH BASE ON THIS," COMMA CLOSE QUOTE. MR. GODKIN
20 PROVIDED THE SAME SUMMARY AS DISCUSSED HEREIN AND RESPONDED
21 QUOTE "UNFORTUNATELY I WILL BE IN ARBITRATION STARTING
22 TOMORROW FOR THE NEXT SEVERAL DAYS OR NEXT FEW DAYS, BUT MY
23 COLLEAGUE JIM KRUZER WHO IS WORKING WITH ME ON THE FACEBOOK
24 LITIGATION WILL TOUCH BASE WITH YOU." CLOSE QUOTE
25 AND MR. KRUZER SUBSEQUENTLY SET UP A CONFERENCE CALL.

26 NUMBER EIGHT, MR. KRAMER SENT THE SUMMARY AND THE

1 TARGET THIRD PARTY THIRD PARTY RECIPIENT INQUIRED QUOTE, "HOW
2 WOULD YOU LIKE TO PROCEED?" CLOSE QUOTE MR. KRAMER RESPONDED
3 QUOTE, "I WOULD SUGGEST AS THE NEXT STEP THAT WE SET UP A
4 PHONE CALL WITH ONE OF THE ATTORNEYS ON THE CASE, JIM KRUZER,
5 WHOM I'VE COPIED ON THIS NOTE." CLOSE QUOTE.

6 NUMBER NINE, IN EMAILING THE SUMMARY, MR. GODKIN
7 WROTE, QUOTE "I'M KNOW, AS IT'S AS WRITTEN, YOU MUST BE
8 EXTREMELY BUSY, BUT I WATCHED YOU ON THE NEWS YESTERDAY AND
9 THE MEDIA'S NARRATIVE AROUND CAMBRIDGE ANALYTICA IS ALL WRONG.
10 PERIOD. YOU ARE IN A UNIQUE POSITION TO CORRECT IT. HERE IS
11 THE TRUTH BELOW. I HOPE YOU DO FIND TIME TO EXPLORE IT AT
12 SOME POINT. YOU HAVE MY CONTACT INFORMATION IF YOU OR YOUR
13 TEAM FREES UP." PERIOD CLOSE QUOTE.

14 THE COURT FINDS THE ABOVE REFERENCES AND EMAILS TO
15 CONFERENCE CALLS AND ORAL COMMUNICATIONS INVOLVING SIX4THREE'S
16 COUNSEL, ITS LEGAL TEAM, AND MR. KRAMER WITH TARGETED THIRD
17 PARTIES PERTAINING TO FACEBOOK'S DOCUMENTS WARRANT THESE
18 DEPOSITIONS.

19 FURTHERMORE, IN A DECLARATION, MR. GROSS DOES NOT
20 AFFIRMATIVELY STATE THAT HE DID NOT RECEIVE OR READ THE EMAILS
21 THAT HE WAS CC:ED ON, BUT RATHER HE QUOTE "DID NOT PAY MUCH
22 ATTENTION TO THESE EMAILS WITH THE PRESS ON WHICH I WAS SIMPLY
23 COPIED." PERIOD CLOSE QUOTE.

24 THE EXCUSE OF INATTENTION DOES NOT SHIELD MR. GROSS
25 FROM DEPOSITION. IT IS APPARENT FROM THE EVIDENCE THAT
26 SIX4THREE'S COUNSEL WAS ENGAGED IN THE QUOTE "HEAVY LIFTING"

1 CLOSE QUOTE OF ANALYZING AND SUMMARIZING FACEBOOK'S
2 CONFIDENTIAL INFORMATION TO THIRD PARTIES, AND NOT MERELY
3 ACTING IN AN ADVISORY ROLE TO SIX4THREE.

4 FURTHERMORE, THIS EVIDENCE IS INCONGRUOUS WITH THE
5 STATEMENTS MADE BY SIX4THREE'S COUNSEL IN DECLARATIONS TO THE
6 COURT.

7 QUOTE "AT NO TIME DID MY FIRM DIRECT, AUTHORIZE,
8 CONDONE, OR OTHERWISE SANCTION THE RELEASE, DISCLOSURE, OR
9 COMMENTARY BY MR. KRAMER, MR. SCARAMELLINO, EXPERTS AND
10 CONSULTANTS OF ANY CONFIDENTIAL OR HIGHLY CONFIDENTIAL
11 INFORMATION TO ANY THIRD PARTY.

12 QUOTE, "AT NO TIME DID I, MY EMPLOYEES OR MY FIRM
13 DIRECT, AUTHORIZE CONDONE, OR OTHERWISE SANCTION THE RELEASE,
14 DISCLOSURE, OR COMMENTARY BY MR. KRAMER, MR. SCARAMELLINO,
15 EXPERTS AND CONSULTANTS OF ANY CONFIDENTIAL OR HIGHLY
16 CONFIDENTIAL INFORMATION TO THIRD PARTIES.

17 FURTHERMORE, MR. SCARAMELLINO, A MEMBER OF
18 SIX4THREE'S LEGAL TEAM AND LAW CLERK FOR BIRNBAUM & GODKIN,
19 LLP CONTRADICTS MR. GODKIN.

20 QUOTE, "AT NO TIME FROM MY EXECUTION OF THE ATTACHED
21 CERTIFICATION ON DECEMBER 1ST, 2016, HAVE I PROVIDED
22 INFORMATION SUBJECT TO THE PROTECTIVE ORDER TO ANY
23 UNAUTHORIZED INDIVIDUALS OR OUTSIDE THE SCOPE OF MR. GODKIN'S
24 SUPERVISION OR WITHOUT MR. GODKIN'S KNOWLEDGE." PERIOD CLOSE
25 QUOTE.

26 LASTLY, MR. GODKIN CONTRADICTS HIMSELF IN TWO OF HIS

1 DECLARATIONS AS TO THE HANDLING OF FACEBOOK'S HIGHLY
2 CONFIDENTIAL INFORMATION. QUOTE, "AS SET FORTH ABOVE, B&G
3 ONLY PROVIDED THIRD PARTIES WITH FACEBOOK'S CONFIDENTIAL OR
4 HIGHLY CONFIDENTIAL INFORMATION IN CONFORMANCE WITH THE
5 PROTECTIVE ORDER." CLOSE QUOTE.

6 HOWEVER, IN A SUBSEQUENT DECLARATION, MR. GODKIN
7 ADMITS HE PROVIDED HIGHLY CONFIDENTIAL INFORMATION TO
8 MR. SCARAMELLINO DESPITE MR. SCARAMELLINO STRIKING OUT QUOTE
9 "HIGHLY CONFIDENTIAL INFORMATION" CLOSE QUOTE FROM THE
10 CERTIFICATION HE EXECUTED.

11 MR. SCARAMELLINO SHOULD NOT HAVE RECEIVED HIGHLY
12 CONFIDENTIAL INFORMATION WITHOUT EXECUTING THE CERTIFICATION.

13 BASED UPON THE FOREGOING, THE COURT GRANTS, IN PART,
14 AND DENIES, IN PART, FACEBOOK'S MOTION TO OPEN DISCOVERY AND
15 TO COMPEL. THE OPENING OF DISCOVERY IS LIMITED TO THE
16 REVEALING OR DISCUSSING OF FACEBOOK'S CONFIDENTIAL INFORMATION
17 PURSUANT TO THE STIPULATED PROTECTIVE ORDER, PARAGRAPH 6 AND
18 DISCLOSURES OR PROVIDING THEREOF.

19 DISCOVERY OF THE MERITS OF THE ACTION REMAIN STAYED
20 PENDING THE CROSS-APPEALS OF THE ORDER ON THE ANTI-SLAPP
21 MOTIONS.

22 FACEBOOK'S REQUEST FOR DISCOVERY BASED ON THE
23 NOTICES OF DEPOSITION IS PREMATURE. ON NOVEMBER 30TH, 2018,
24 FACEBOOK SERVED NOTICES OF DEPOSITION WITH REQUESTS FOR
25 PRODUCTION OF DOCUMENTS, AND THUS, DOCUMENTS NEED NOT BE
26 PRODUCED PRIOR TO THE DEPOSITION DATE.

1 AND THAT'S PURSUANT TO CODE OF CIVIL PROCEDURE
2 SECTION 2025. -- EXCUSE ME -- 2025.220(B)(4).

3 ACCORDINGLY, THE COURT GRANTS FACEBOOK LEAVE TO
4 SERVE ITS REQUEST FOR PRODUCTION OR SUBPOENA DUCES TECUM,
5 WHICHEVER IS APPROPRIATE AS A METHOD, ON MR. GROSS,
6 MR. GODKIN, MR. KRAMER, AND MR. SCARAMELLINO AS ENUMERATED IN
7 APPENDIX A TO FACEBOOK'S MEMORANDUM OF POINTS AND AUTHORITIES
8 RECEIVED JANUARY 9TH, 2019. A COPY OF APPENDIX A IS ATTACHED
9 TO THIS ORDER AS EXHIBIT A.

10 THE ATTORNEY-CLIENT PRIVILEGE IS WAIVED PURSUANT TO
11 THE CRIME-FRAUD EXCEPTION. A WORK PRODUCT LOG SHALL BE SERVED
12 FOR ANY DOCUMENTS WITHHELD ON THOSE GROUNDS.

13 THE REQUEST TO COMPEL DEPOSITIONS ARE PREMATURE
14 GIVEN FACEBOOK IS REQUESTING PRODUCTION OF THE DOCUMENTS PRIOR
15 TO THE DEPOSITION. SCHEDULING OF DEPOSITIONS ARE CONTINGENT
16 ON PRODUCTION, WHICH SHALL BE THE SUBJECT OF A FURTHER
17 DISCOVERY CONFERENCE ON APRIL 26, 2019, AT 2:00 O'CLOCK P.M.

18 LASTLY, THE COURT ACKNOWLEDGES THAT MR. KRAMER AND
19 MR. SCARAMELLINO'S RESPONSE AND PRODUCTION TO EXHIBIT -- TO
20 APPENDIX A WILL BE GREATLY CURTAILED GIVEN THE ORDERS OF THIS
21 COURT AND WILL REQUIRE SEARCHES OF THEIR PRESERVED DATA BY THE
22 FORENSIC EXAMINER.

23 NOW, IN EARLIER PROCEEDINGS, SIX4THREE AND ITS
24 COUNSEL HAVE EXPRESSED CONCERN THAT THE FORENSIC EXAMINER,
25 STROZ FRIEDBERG, IS NOT TRULY A NEUTRAL THIRD PARTY FORENSIC
26 EXAMINER BECAUSE FACEBOOK HAS REFUSED TO RELINQUISH SEEKING

1 STROZ FRIEDBERG'S EXPERTISE IN THIS AND OTHER MATTERS.

2 ALTHOUGH THE COURT PREVIOUSLY ORDERED STROZ
3 FRIEDBERG TO CONDUCT A LIMITED SEARCH OF LOGS BASED ON
4 EX PARTE RELIEF, A NEUTRAL THIRD PARTY FORENSIC EXAMINER SHALL
5 NOW BE APPOINTED. ACCORDINGLY, THE PARTIES' COUNSEL (NOT
6 PERSONAL COUNSEL) SHALL MEET AND CONFER AND PROPOSE THREE
7 NEUTRAL FORENSIC EXAMINERS TO THE COURT NO LATER THAN
8 MARCH 22ND, 2019 TO CONDUCT SEARCHES ON MR. KRAMER AND
9 MR. SCARAMELLINO'S DATA CURRENTLY IN THE POSSESSION, CUSTODY
10 AND/OR CONTROL OF STROZ FRIEDBERG.

11 THE COST OF THE NEUTRAL THIRD PARTY FORENSIC
12 EXAMINER WILL BE BORNE SOLELY BY FACEBOOK GIVEN SIX4THREE'S
13 INABILITY TO PAY.

14 THE COURT WILL ISSUE AN ORDER APPOINTING THE NEUTRAL
15 THIRD PARTY FORENSIC EXAMINER AND THE TRANSFER OF ALL DATA AND
16 DOCUMENTS PERTAINING TO THE CHAIN OF CUSTODY FROM STROZ
17 FRIEDBERG SO THAT IT IS NO LONGER IN THE POSSESSION, CUSTODY,
18 AND/OR CONTROL OF STROZ FRIEDBERG.

19 STROZ FRIEDBERG SHALL FILE AND SERVE A DECLARATION
20 OF COMPLIANCE. STROZ FRIEDBERG SHALL STILL MAINTAIN ALL
21 DOCUMENTS PERTAINING TO CHAIN OF CUSTODY. THE ORDER FOR STROZ
22 FRIEDBERG NOT TO DISCLOSE, DISCUSS, OR REVEAL ANY INFORMATION
23 OBTAINED FROM THE DATA IN ITS POSSESSION, CUSTODY, OR CONTROL
24 OUTSIDE OF FURTHER ORDER OF THE COURT SHALL REMAIN IN EFFECT.

25 THE PARTIES SHALL ALSO MEET AND CONFER ON THE
26 PARAMETERS OF THE SEARCHES FOR ELECTRONIC DOCUMENTS IN THE

1 POSSESSION, CUSTODY, OR CONTROL OF THE NEUTRAL THIRD PARTY
2 FORENSIC EXAMINER. A DISCOVERY CONFERENCE ON THE LIMITED
3 ISSUES OF THE OPENING OF DISCOVERY IS SET FOR APRIL 26, 2019
4 AT 2:00 P.M. IT IS SO ORDERED.

5 DURING THE COURSE OF MY REVIEW OF THIS ORDER IN MY
6 HASTE THERE ARE A COUPLE OF TYPOGRAPHICAL ERRORS THAT I HAVE
7 CORRECTED ON THE ORIGINALS. ONE OF THEM IS ON PAGE 12 AT
8 LINE 13. "OPT" SHOULD BE "OR" THAT IS BETWEEN ANY
9 CONFIDENTIAL OR HIGHLY CONFIDENTIAL INFORMATION. AND AT
10 LINE 26 ON PAGE 13. THE PHRASE IS STROZ FRIEDBERG'S EXPERTISE
11 IN THIS AND OTHER MATTERS.

12 THE COURT IS EXECUTING IN OPEN COURT THE ORDER
13 RECITED ON THE RECORD. IT IS SO ORDERED. I ASK THE COURTROOM
14 CLERK TO MAKE THOSE CHANGES ON THE RESPECTIVE PAGES THAT I
15 HAVE CITED ON THE RECORD. THANK YOU VERY MUCH, EVERYONE.
16 COURT IS IN RECESS.

17 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

18 ---000---

1 STATE OF CALIFORNIA)

2) SS.

3 COUNTY OF SAN MATEO)

4 I, GERALDINE VANDEVELD, OFFICIAL COURT REPORTER,
5 COUNTY OF SAN MATEO, STATE OF CALIFORNIA, DO HEREBY CERTIFY:

6 THAT THE FOREGOING CONTAINS A TRUE, FULL AND CORRECT
7 TRANSCRIPT OF THE PROCEEDINGS GIVEN AND HAD IN THE
8 WITHIN-ENTITLED MATTER THAT WERE REPORTED BY ME AT THE TIME
9 AND PLACE MENTIONED AND THEREAFTER TRANSCRIBED BY ME OR AT MY
10 DIRECTION INTO LONGHAND TYPEWRITING AND THAT THE SAME IS A
11 CORRECT TRANSCRIPT OF THE PROCEEDINGS.

12 DATED: MARCH 25, 2019

13 

14
15 GERALDINE VANDEVELD, C.S.R. #8634
16 OFFICIAL COURT REPORTER
17
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EXHIBIT 6

1 IN THE SUPERIOR COURTS OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN MATEO

3 ---000---

4
5 SIX4THREE, LLC,

CERTIFIED TRANSCRIPT

6 PLAINTIFFS,

7 VS.

CASE NO. CIV533328

8 FACEBOOK, INC., ET AL.,

9 DEFENDANTS.

10 _____/

11
12 REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 BEFORE: HONORABLE V. RAYMOND SWOPE, JUDGE

14 DEPARTMENT 23

15 MAY 10, 2019

16
17 A P P E A R A N C E S

18 FOR THE PLAINTIFFS:

19 CHRISTOPHER SARGENT
ATTORNEY AT LAW

DONALD P. SULLIVAN
ATTORNEY AT LAW

20 JAMES A. MURPHY
ATTORNEY AT LAW

JOSEPH S. LEVERONI
ATTORNEY AT LAW

21 FOR THE DEFENDANTS:

22 JOSH H. LERNER
ATTORNEY AT LAW

LAURA E. MILLER
ATTORNEY AT LAW

CATHERINE Y. KIM
ATTORNEY AT LAW

23 SONAL N. MEHTA
ATTORNEY AT LAW

NATALIE NAGLE
ATTORNEY AT LAW

24
25
26 REPORTED BY: GERALDINE VANDEVELD, C.S.R. 8634

P R O C E E D I N G S

REDWOOD CITY, CALIFORNIA

MAY 10, 2019

--000--

THE COURT: GOOD MORNING, EVERYONE.

MR. MURPHY: GOOD MORNING, YOUR HONOR.

MS. MEHTA: GOOD MORNING, YOUR HONOR.

THE COURT: CALLING CASE NO. 533328. THE MATTER OF SIX4THREE, LLC V. FACEBOOK, INC. ET AL. WILL COUNSEL PLEASE STATE THEIR APPEARANCES FOR THE RECORD.

MR. LEVERONI: GOOD MORNING AGAIN, YOUR HONOR. JOE LEVERONI FROM MURPHY PEARSON BRADLEY AND FEENEY ON BEHALF OF BIRNBAUM AND GODKIN. AND I'M APPEARING WITH JAMES MURPHY AS WELL, YOUR HONOR.

MR. MURPHY: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING.

MR. SARGENT: GOOD MORNING, YOUR HONOR. CHRIS SARGENT FOR THIRD PARTY TED KRAMER AND TOM SCARAMELLINO.

MR. SULLIVAN: GOOD MORNING, YOUR HONOR. DON SULLIVAN FOR STUART GROSS.

THE COURT: GOOD MORNING.

MS. MEHTA: GOOD MORNING, YOUR HONOR. SONAL MEHTA, JOSH LERNER, LAURA MILLER AND CATHERINE KIM FROM DURIE TANGRI ON BEHALF OF FACEBOOK. AND WITH US TODAY IS NATALIE NAGLE

1 FROM FACEBOOK.

2 THE COURT: GOOD MORNING. COUNSEL, ORDINARILY THE
3 COURT DOES NOT RECORD EX PARTE HEARINGS BECAUSE THEY ARE
4 EX PARTE IN NATURE. HOWEVER, GIVEN THE LITIGIOUS NATURE OF
5 THIS CASE, THE CURRENT POSTURE OF THIS CASE, AS WELL AS THE
6 COMPLEXITY OF THE MATTERS BEFORE IT, THIS COURT -- ESPECIALLY
7 THE MATTERS THAT ARE BEFORE THIS COURT THAT ARE NOT EMBRACED
8 BY THE ANTI-SLAPP APPEALS WHICH IS THE REASON WE'RE HAVING
9 THIS HEARING. I BELIEVE THAT IT IS ESSENTIAL TO HAVE A COURT
10 REPORTER MAKE A RECORD HEARING ON BIRNBAUM AND GODKIN'S
11 EX PARTE APPLICATION TO STAY DISCOVERY.

12 FIRST OF ALL, IN THE COURT'S INTEREST OF JUDICIAL
13 ECONOMY I'M JUST GOING TO MAKE SOME OBSERVATIONS HERE. THE
14 COURT IS MINDFUL OF THE FACT THAT SIX4THREE IS NOW
15 UNREPRESENTED BY COUNSEL. AND BECAUSE OF THIS, THE COURT
16 ORDERS THAT DISCOVERY HEREBY BE STAYED. THERE IS NO WAY THAT
17 THE DISCOVERY CAN BE CONDUCTED WHEN SIX4THREE IS UNREPRESENTED
18 BECAUSE A CORPORATION CANNOT APPEAR IN A CASE IN PROPRIA
19 PERSONA UNLIKE A NATURAL PERSON.

20 SECOND, REGARDING BIRNBAUM AND GODKIN'S REQUEST FOR
21 CLARIFICATION OF THE CRIME-FRAUD EXCEPTION TO THE
22 ATTORNEY/CLIENT PRIVILEGE BETWEEN SIX4THREE FORMER COUNSEL AND
23 MR. KRAMER AND ALSO MR. SCARAMELLINO. THIS REQUEST IS DENIED
24 AS MOOT IN LIGHT OF MY PREVIOUS ORDER STAYING DISCOVERY UNTIL
25 SIX4THREE SECURES NEW COUNSEL.

26 FURTHER, THE EX PARTE REQUEST FOR CLARIFICATION OF

1 THE SCOPE OF THE WAIVER OF THE ATTORNEY/CLIENT PRIVILEGE
2 PURSUANT TO THE CRIME-FRAUD EXCEPTION IS NOT A PROPER FORUM OR
3 PROCEDURE FOR SEEKING SUCH RELIEF.

4 THE APPROPRIATE PROCEDURE WOULD BE A FORMAL NOTICED
5 MOTION FOR RECONSIDERATION, A FORMAL NOTICED MOTION FOR
6 CLARIFICATION OF THE ORDER OR A FORMAL NOTICED MOTION FOR
7 PROTECTIVE ORDER. NEITHER OF THESE FORMAL NOTICED MOTIONS
8 HAVE BEEN FILED.

9 THIRD, THERE IS NO EXIGENT CIRCUMSTANCE TO SEEK SUCH
10 EX PARTE RELIEF. FINALLY, THE MURPHY PEARSON FIRM HAS MADE
11 MULTIPLE REPRESENTATIONS THAT THE FIRM WAS INTENDING TO FILE A
12 WRIT. BUT INASMUCH AS THERE HAS BEEN A STAY OF DISCOVERY THAT
13 I JUST ISSUED THAT WILL BE PURSUANT TO A FORMAL ORDER THAT I
14 WILL HAVE COUNSEL PREPARE LATER, THE ISSUE IS NOT RIPE FOR
15 APPELLATE REVIEW IN ANY EVENT AS THERE HAS BEEN NO FORMAL
16 HEARING ON A NOTICED MOTION CONCERNING EITHER RECONSIDERATION
17 OR A CLARIFICATION OF THE MARCH 15TH, 2019 ORDER, PAGE 4,
18 LINE 6 THROUGH 7 THAT DEFINED THE SCOPE OF THE DISCOVERY
19 LIMITED IN NATURE TO BE PERFORMED BY FACEBOOK IN RELATION TO
20 THE CRIME-FRAUD EXCEPTION. THEREFORE, THE COURT WILL NOT HEAR
21 OR ADDRESS THE MERITS OF THE CLARIFICATION REQUESTS.

22 THIRD, THERE'S THE MATTER OF MY CASE MANAGEMENT
23 ORDER NO. 22. THAT RELATES TO THE RETENTION OF VESTIGENT AS A
24 CONSULTANT IN THIS CASE. THE COURT BELIEVES THAT ITS REVIEWED
25 ITS ORDER REQUIRING FACEBOOK TO PAY FOR THE STORAGE OF THE
26 DATA BY VESTIGENT AND THE COURT BELIEVES IT MAY HAVE

1 OVERSTEPPED ITS BOUNDS REQUIRING FACEBOOK TO PAY FOR THESE
2 COSTS WITHOUT A STIPULATION.

3 THE COURT WILL NOT, SHALL NOT AND WILL NOT CONSIDER
4 IN ANY WAY PAYING FOR THE STORAGE COSTS WITH THE ORDER
5 RETAINING VESTIGENT.

6 NOW, THERE HAS TO BE SOME WAY OF STORING THIS DATA.
7 AND, ALSO, I WANT TO MAKE CLEAR THAT VESTIGENT WILL NOT STORE
8 THE INFORMATION WITHOUT BEING PAID. SO, THEREFORE, DOES
9 FACEBOOK STIPULATE TO PAYING FOR THE STORAGE COSTING FEES
10 BORNE BY VESTIGENT OR ANY OTHER THIRD PARTY?

11 MS. MEHTA: YOUR HONOR, WE DO SUBJECT TO OUR REQUEST
12 TO SEEK RECOVERY OF THAT DURING FURTHER PROCEEDINGS EITHER FOR
13 SANCTION OR CONTEMPT, BUT WE WILL PAY FOR NOW.

14 THE COURT: ALL RIGHT. SO YOU WILL STIPULATE TO
15 THAT?

16 MS. MEHTA: YES. WE STIPULATE TO PAY FOR NOW.

17 THE COURT: YOU ARE DOING THAT VOLUNTARILY. IT HAS
18 TO BE DONE. THE REASON FOR THIS IS THAT STROZ FRIEDBERG IS A
19 CONSULTANT TO FACEBOOK. AND IT WAS EARLY ON FORCED TO
20 PRESERVE AND COLLECT INFORMATION, BUT FACEBOOK DESIRED TO HAVE
21 STROZ FRIEDBERG RETAINED AS THEIR OWN CONSULTANT. AND,
22 THEREFORE, WAS PRECLUDED FROM WEARING TWO HATS. HENCE THE
23 REASON THAT WE HAVE ANOTHER INDEPENDENT CONSULTANT PRESERVING
24 THE DATA.

25 SO THE RECORD SHALL REFLECT THAT FACEBOOK HAS NOW
26 INDICATED THAT THEY ARE WILLING TO STIPULATE SEPARATELY FROM

1 THE ORDER THAT I MADE. AND I'M GOING TO VACATE THE ORDER THAT
2 I PREVIOUSLY MADE INsofar AS I WAS REQUIRING FACEBOOK TO
3 SOLELY PAY. AND IN THE PLACE OF THAT, WILL BE THE ORDER THAT
4 I JUST ISSUED BASED UPON THE STIPULATION IN OPEN COURT BY
5 FACEBOOK TO VOLUNTARILY PAY WITH THE EXPECTATION THAT AT SOME
6 POINT IT WILL SEEK REIMBURSEMENT FROM SIX4THREE; IS THAT
7 CORRECT?

8 MS. MEHTA: THAT'S CORRECT, YOUR HONOR.

9 THE COURT: VERY WELL. IT IS SO ORDERED. FOURTH,
10 THERE IS AN ISSUE OF COMPLIANCE WITH MY AMENDED ORDER.

11 MS. MEHTA: YOUR HONOR, MAY I JUST INTERRUPT YOU?
12 I'M VERY SORRY.

13 THE COURT: YES.

14 MS. MEHTA: ON YOUR LAST STATEMENT.

15 THE COURT: YES.

16 MS. MEHTA: TO BE CLEAR, WE MAY SEEK REIMBURSEMENT
17 FROM SIX4THREE OR FROM THE RELEVANT INDIVIDUALS
18 MR. KRAMER AND MR. SCARAMELLINO THAT IS TO BE DETERMINED.

19 THE COURT: YES. I DON'T WANT TO FORECLOSE ANY
20 RELIEF THAT WILL BE POSSIBLE OR COMPENSABLE UNDER THE
21 CIRCUMSTANCES. SO THAT WILL BE ADDED TO THE ORDER. IS THAT
22 CLEAR?

23 MS. MEHTA: THANK YOU, YOUR HONOR.

24 THE COURT: I'M GOING TO BE ASKING FACEBOOK TO
25 PREPARE THE ORDER ON THE PROCEEDINGS TODAY. ALL RIGHT.

26 NEXT IS THE REQUEST. THE UNFULFILLED ORDER

1 REQUIRING BIRNBAUM GODKIN TO ISSUE AN ORDER OR A DECLARATION
2 THAT WOULD BE A REVISED DECLARATION WITH THE DOCUMENTS THAT
3 WERE NOT SUBJECT TO SEAL OR THE -- THAT THE COURT REFUSED TO
4 SEAL. AND THAT'S ON PAGE 15, PARAGRAPH 8 ESSENTIALLY. THOSE
5 DOCUMENTS ARE DESCRIBED IN THE PRECEDING PARAGRAPHS I BELIEVE
6 PARAGRAPH 6 AND 7. IS THAT CORRECT, COUNSEL? AND, AGAIN, I'M
7 REFERRING TO MY AMENDED NOVEMBER 1ST, 2018, ORDERS.

8 MR. LEVERONI: CORRECT.

9 THE COURT: ALL RIGHT. NOW, I DID NOT MAKE IT CLEAR
10 AND I WILL MAKE IT CLEAR NOW. BIRNBAUM GODKIN FAILED TO
11 COMPLY WITH THIS ORDER. THERE HAD BEEN REQUESTS SINCE THIS
12 ORDER THIS ORDER MEANING THE AMENDED ORDER ON FACEBOOK'S
13 MOTIONS TO SEAL FILED JANUARY 8 AND MAY 3RD AND 30TH. THE
14 GUARDIAN AND CNN'S MOTION TO UNSEAL JUDICIAL RECORDS. AND,
15 THREE, THE NEW YORK TIMES ASSOCIATED PRESS AND WASHINGTON POST
16 MOTION TO UNSEAL. THE ORDER THEREON FILED NOVEMBER 1ST, 2018.
17 OKAY.

18 IN OTHER WORDS THE ORDER THAT I'M HOLDING IN MY LEFT
19 HAND THAT I'M JUDICIALLY NOTICING. AND THAT'S AVAILABLE
20 ONLINE. THAT AMENDED FILED -- AMENDED ORDER FILED
21 NOVEMBER 1ST, 2018.

22 IS EVERYONE FAMILIAR WITH THAT ORDER?

23 MS. MEHTA: YES, YOUR HONOR.

24 THE COURT: ALL RIGHT. AGAIN, BIRNBAUM AND GODKIN
25 DID NOT COMPLY WITH THAT ORDER. AND HENCE AND SINCE THEN
26 THERE HAVE BEEN REQUESTS BY THE MEDIA TO HAVE ACCESS TO THAT

1 DECLARATION AND THE ATTACHMENTS. NOW, IT IS NOT APPROPRIATE
2 TO SEND AN EMAIL OR SOME TYPE OF COMMUNICATION TO THE RECORDS
3 DEPARTMENT. RATHER THERE SHOULD BE A REVISED DECLARATION
4 CONSISTENT WITH THE ORDER THAT I PREVIOUSLY ISSUED BACK ON
5 NOVEMBER 1ST WITH THE DOCUMENTS SO INDICATED THAT ARE NOT
6 SUBJECT TO SEAL.

7 SO I'M ORDERING BIRNBAUM AND GODKIN AND FACEBOOK TO
8 MEET AND CONFER ON THE PREPARATION OF THE DECLARATION AND THE
9 DOCUMENTS TO BE ATTACHED THERETO. DOES EVERYONE UNDERSTAND
10 THAT?

11 MS. MEHTA: YES, YOUR HONOR.

12 THE COURT: NOW, THAT REVISED ORDER HAS A CAPTION.
13 AND THAT REVISED ORDER SHOULD BE CAPTIONED AS FOLLOWS
14 "REVISED DECLARATION OF DAVID S. GODKIN IN OPPOSITION TO
15 DEFENDANTS' SPECIAL MOTIONS TO STRIKE (ANTI-SLAPP), FILED
16 MAY 17, 2018, PURSUANT TO THE AMENDED ORDER ON THE MOTIONS TO
17 SEAL AND UNSEAL, ISSUED ON NOVEMBER 1ST, 2018." THAT IS THE
18 CAPTION. WOULD YOU LIKE FOR ME TO READ IT AGAIN? I WILL AND
19 I WILL SPEAK MORE SLOWLY.

20 MR. MURPHY: THANK YOU, YOUR HONOR.

21 THE COURT: ALL RIGHT. VERY WELL. THE REVISED
22 DECLARATION BY MR. GODKIN SHALL READ AS FOLLOWS "REVISED
23 DECLARATION OF DAVID S. GODKIN IN OPPOSITION TO DEFENDANTS'
24 SPECIAL MOTIONS TO STRIKE (ANTI-SLAPP), FILED MAY 17TH, 2018,
25 PURSUANT TO THE AMENDED ORDER ON THE MOTIONS TO SEAL AND
26 UNSEAL, ISSUED ON NOVEMBER 1ST, 2018."

1 DOES EVERYONE HAVE THAT?

2 MR. MURPHY: YES, YOUR HONOR.

3 MS. MEHTA: YES, YOUR HONOR.

4 THE COURT: IS THAT SLOW ENOUGH FOR EVERYONE?

5 MR. LEVERONI: YES, YOUR HONOR. THANK YOU.

6 THE COURT: VERY WELL. I MUST SAY HAVING BEEN THE
7 RECIPIENT OF HAVING TO WRITE MATTERS LIKE THIS THAT ARE
8 DICTATED BY SOMEONE OR STATED ON THE RECORD BY A JUDGE IS
9 DIFFICULT AND I AM MINDFUL OF THAT.

10 SO THAT THERE'S NO MISTAKE, IT'S ESSENTIAL THAT
11 COUNSEL AT LEAST MEET AND CONFER ON THAT DECLARATION AND FILE
12 IT. AND THAT'S THE ONLY REMEDY. THE OTHER -- THERE WAS AN
13 ALTERNATIVE THAT WAS POSED YESTERDAY OR THE DAY BEFORE. AND I
14 DON'T THINK IT'S APPROPRIATE. YOU DON'T SEND SOMETHING LIKE
15 THAT TO RECORDS. IT SHOULD BE EFILED WITH THE DEPARTMENT.
16 OKAY.

17 MR. LEVERONI: UNDERSTOOD.

18 THE COURT: OKAY. GOOD. LASTLY, THE DISCOVERY
19 CONFERENCE THAT WAS SCHEDULED FOR TODAY IS MOOT GIVEN MY
20 ISSUANCE OF A STAY ON DISCOVERY. NOW, I WILL SAY THIS ABOUT
21 THE MATTERS BEFORE THE COURT. THE COURT HAS BEEN MADE AWARE
22 THAT THERE ARE PARTS OF THE DATA THAT WERE SUBJECT TO SEAL
23 THAT REMAIN IN CIRCULATION AND ALLEGEDLY ARE THE SUBJECT OF
24 NEW AND ADDITIONAL CIRCULATION THAT HAVE BEEN COMPLAINED OF BY
25 FACEBOOK.

26 I'M ORDERING ALL PARTIES TO CEASE AND DESIST FROM

1 VIOLATING THE PROTECTIVE ORDER FILED IN THIS CASE IN OCTOBER
2 OF 2016. SPECIFICALLY DATED FILED OCTOBER 25TH, 2016.

3 FURTHER, I AM ORDERING ALL PARTIES TO ABIDE BY AND
4 NOT BREACH THE ORDERS ON THE MOTIONS TO SEAL THAT I RULED UPON
5 PRIOR TO THE BREACH OF THE STIPULATED PROTECTIVE ORDER AND
6 ESSENTIALLY THE ORDERS TO SEAL PRIOR TO THE DISCLOSURE TO THE
7 DCMS COMMITTEE OF THE HOUSE OF COMMONS.

8 WHETHER OR NOT AN ORDER IS POPULAR AND MATTERS THAT
9 ARE SEALED ARE INTERESTING AND EITHER JUICY OR SALACIOUS OR
10 SOMETHING THAT SHOULD BE DISCLOSED IN THE MINDS OF SOME THAT
11 ARE SUBJECT TO A PROTECTIVE ORDER, IT DOESN'T MEAN THAT
12 BECAUSE THEY ARE JUICY AND SALACIOUS AND IMPORTANT FOR OTHERS
13 TO SEE, THAT THEY SHOULD BE DISCLOSED NOTWITHSTANDING THE
14 PROTECTIVE ORDER.

15 IF THIS IS DONE, IT WILL RENDER IN PRINCIPAL ALL
16 PROTECTIVE ORDERS IN MATTERS SIMILARLY SITUATED AS MOOT AND A
17 MERE EXERCISE. ATTORNEYS AS OFFICERS OF THE COURT HAVE AN
18 IMPORTANT RESPONSIBILITY TO RESPECT PROTECTIVE ORDERS AND ALL
19 OTHER ORDERS THAT ARE ISSUED BY THE COURT. JUST BECAUSE
20 FACEBOOK IS FACEBOOK AND IS NOW AN UNPOPULAR DEFENDANT, IT
21 DOESN'T MEAN THAT YOU CAN VIOLATE ORDERS THAT ARE CONTROLLING
22 INFORMATION IN THIS LAWSUIT.

23 THAT TYPE OF CONDUCT IS REPUGNANT TO THIS COURT. IT
24 IS UNCONSCIONABLE. IT IS WRONG. SO THAT'S ALL I HAVE TO SAY
25 ABOUT VIOLATING COURT ORDERS, BUT I THINK I HAD SAID THAT
26 PREVIOUSLY. I'VE SAID ALL THAT TO SAY THAT THERE SHALL NOT BE

1 ANY FURTHER BREACHES OF THAT PROTECTIVE ORDER OR RELEASE OF
2 ANY OTHER INFORMATION SUBJECT TO THE STIPULATED PROTECTIVE
3 ORDER DATED OCTOBER 25TH, 2016, OR THE MOTIONS TO SEAL ORDERS
4 ON MOTIONS TO SEAL PERIOD.

5 DOES EVERYONE UNDERSTAND THAT?

6 MR. MURPHY: YES, YOUR HONOR.

7 THE COURT: DOES ANYONE TAKE ISSUE WITH THE COURT
8 WITH WHAT THE COURT HAS SAID?

9 MR. MURPHY: NOT AT ALL.

10 THE COURT: IF YOU DO, PLEASE SAY SO NOW. VERY
11 WELL. ALL RIGHT. I BELIEVE THAT'S ALL THAT WAS ON TAP FOR
12 TODAY. YES, MS. MEHTA.

13 MS. MEHTA: YES, YOUR HONOR. A COUPLE OF ISSUES.
14 THE FIRST ONE IS TO ASK WHETHER YOUR HONOR WILL PERMIT
15 ARGUMENT ON THE STAY THAT YOU ENTERED ON DISCOVERY. AND THEN
16 THE SECOND ONE IS THE SCHEDULING.

17 THE COURT: NO. I THINK THE -- YOU HAVE A DUE
18 PROCESS RIGHT TO ARGUE AND I WILL ALLOW YOU TO ARGUE. THOSE
19 ARE MY PRELIMINARY RULINGS. SOME OF THEM ARE -- I BELIEVE
20 THAT I WILL KEEP AN OPEN MIND AND ALLOW YOU TO ARGUE. BUT I
21 THINK THAT IN ANTICIPATING YOUR ARGUMENTS, COUNSEL, THERE ARE
22 STILL MATTERS THAT ARE BEING RELEASED IN THE PUBLIC. RIGHT?

23 MS. MEHTA: YES.

24 THE COURT: I JUST ISSUED AN ORDER TO STOP THAT. SO
25 EVERY CONTINUING VIOLATION OF AN ORDER IS A VIOLATION OF PENAL
26 CODE SECTION 166(A)(4). IT'S A CRIME. SO PRACTICALLY THIS

1 COURT HAS MADE MANY ORDERS INCLUDING THE ONE THAT ITS JUST
2 RENDERED TO CONTROL THIS INFORMATION. AND THAT INFORMATION IS
3 OUT IN THE PUBLIC DOMAIN. THE COURT'S CONCERN AND THE ONLY
4 CONCERN IS THAT THE COURT HAS RENDERED ORDERS THAT ARE NOT
5 BEING OBEYED.

6 SO HAVING SAID THAT, I WILL ENTERTAIN ARGUMENTS.
7 BUT SINCE THE PLAINTIFFS' COUNSEL'S COUNSEL HAVE FILED THE
8 MOVING PAPERS, THEY SHOULD BE PERMITTED TO GO FIRST WITH
9 REGARD TO THE MOTION FOR STAY AND THE MERITS TO THE MOTIONS TO
10 STAY.

11 MR. LEVERONI: YOUR HONOR, JUST FOR SAKE OF
12 CLARIFICATION, BIRNBAUM AND GODKIN NO LONGER REPRESENTS
13 PLAINTIFF. PLAINTIFF IS UNREPRESENTED WHICH IS THE BASIS FOR
14 THE MOVING PAPERS.

15 THE COURT: RIGHT. HOWEVER, THERE'S A QUESTION OF
16 STANDING WITH REGARD TO BIRNBAUM AND GODKIN, ET AL. IN MAKING
17 THESE ARGUMENTS. AND THE COURT IS JUST GOING TO LOOK BEYOND
18 THAT STANDING ISSUE BECAUSE YOU'RE STANDING IN THE ISSUES
19 ESSENTIALLY OF BIRNBAUM AND GODKIN AS THEY WERE WHEN THEY
20 REPRESENTED SIX4THREE. OTHERWISE, YOU WOULDN'T BE HERE AND
21 YOU WOULDN'T BE SEEKING SUCH RELIEF.

22 MR. LEVERONI: CORRECT, YOUR HONOR. WE WOULD SUBMIT
23 ON THE TENTATIVE RULING AT THIS TIME, YOUR HONOR.

24 THE COURT: VERY WELL. ALL RIGHT. COUNSEL FOR
25 FACEBOOK.

26 MR. LERNER: THANK YOU, YOUR HONOR. YOU'VE ALREADY

1 SUMMARIZED THE FACT THAT MANY OF YOUR ORDERS HAVE NOT BEEN
2 FOLLOWED STARTING WITH THE PROTECTIVE ORDER. AND THEN THE
3 ORDER NOT TO PRODUCE THIS INFORMATION WHEN WE AND THE COURT
4 WERE NOTIFIED ABOUT IT. THAT'S HOW WE GOT HERE. BUT MORE
5 PROBLEMATICALLY WITH RESPECT TO THE STAY, WHAT HAPPENED IF WE
6 JUST WALKED THROUGH THE SEQUENCE IS JUST MORE OF THE SAME. WE
7 FACEBOOK ARE NO LONGER BEING GOVERNED BY YOUR HONOR'S ORDERS.
8 WE ARE BEING CONTROLLED BY THE PLAINTIFFS' DISOBEDIENCE OF
9 THOSE ORDERS OVER AND OVER.

10 SO WHEN YOU RULED CAREFULLY AND AT LENGTH ON THE
11 CRIME-FRAUD EXCEPTION AND REVIEWED AND AUTHORIZED REQUEST FOR
12 PRODUCTION AND REVIEWED AND DISCUSSED WHY THE DEPOSITIONS OF
13 CERTAIN PEOPLE WOULD BE PROPER, WE FOLLOWED THAT ORDER. AND
14 WHAT WE GOT AS OUTLINED AND AS YOUR HONOR DESCRIBED FROM
15 PLAINTIFFS' COUNSEL IS WE'RE NOT DOING THAT BECAUSE WE THINK
16 JUDGE SWOPE WAS WRONG. THAT'S IN OUR LETTER BRIEFS. IT'S IN
17 SOME OF THE TRANSCRIPTS. JUST FLAT OUT WE'RE NOT FOLLOWING
18 JUDGE SWOPE.

19 MAYBE ONE DAY THE COURT OF APPEAL WILL SAY
20 OTHERWISE. AND AS YOUR HONOR POINTED OUT AND THIS IS WHERE,
21 AGAIN, THINGS BECOME CLEAR. THEY INITIALLY SAID AS YOU
22 EXPLAINED WE'LL FILE THE WRIT. DON'T WORRY. IT'S COMING. WE
23 DON'T LIKE THE CRIME-FRAUD RULING AS THEY SAID WHEN THEY
24 REFUSED TO FOLLOW YOUR ORDER, BOTH BEFORE AND AFTER. WE'LL
25 FILE THE WRIT. OF COURSE THEY DIDN'T DO THAT BECAUSE THAT
26 WOULD HAVE BEEN EXPEDITIOUS AND WOULD HAVE RESULTED IN MOVING

1 THE BALL FORWARD.

2 WHAT HAPPENED AND IS NOW CLEAR IS THAT THERE WAS A
3 GAIN TO SAY, "OH, NO. ONCE WE'RE OUT AND WE'VE WITHDRAWN,
4 NOBODY CAN FILE THAT WRIT." SO FIRST THEY SAID "WE'LL FILE
5 THE WRIT." AND NOW THEY'RE SAYING, IF YOU READ THEIR PAPERS,
6 "WE CAN'T DO IT. SIX4THREE IS THE PARTY THAT WOULD DO THAT."

7 OF COURSE YOUR HONOR ALREADY NOTED IT AND IT'S STILL
8 THE CASE TODAY SIX4THREE'S APPELLATE COUNSEL IS STILL HERE.
9 THEY'RE BUSY FILING BRIEFS AND WORKING ON ALL THE APPEALS IN
10 THIS CASE. NOBODY ON THEIR SIDE IS TALKING ABOUT IT. BUT
11 SIX4THREE IS REPRESENTED AT LEAST AT THE COURT OF APPEAL LEVEL
12 AND IF THERE WERE A WRIT TO BE FILED, THEY HAVE APPELLATE
13 COUNSEL WHO HAS NOT SOUGHT TO WITHDRAW.

14 SO WHAT YOU HAVE IS MONTHS AND MONTHS AND MONTHS OF
15 DELAY. NOT JUST SINCE THE INITIAL VIOLATION BUT SINCE YOU
16 RULED ON CRIME-FRAUD. THAT'S THE BACKDROP FOR WHAT WE WANT TO
17 SAY EXPEDITIOUSLY ABOUT THE STAY AND I THINK SPECIFICALLY THE
18 SCOPE. BECAUSE IN THE PAST YOUR HONOR HAS AND WE'RE GRATEFUL
19 FOR IT LOOKED CAREFULLY AT STAYS LIKE THIS AND WHETHER OR NOT
20 THERE ARE PIECES OF IT THAT WE CAN DO SEQUENTIALLY.

21 WHEN THEY ALL SOUGHT TO WITHDRAW, THEIR THEORY WAS
22 WE'VE GOT OUR OWN SEPARATE ISSUES. THAT'S WHY WE'VE GOT A
23 CONFLICT HERE. THERE'S ALLEGATIONS ABOUT US SEPARATELY THAT
24 REQUIRE US TO WITHDRAW. THAT'S WHY WE CAN'T BE THEIR COUNSEL.
25 AND THE REQUEST FOR PRODUCTION AND THE DEPO TOPICS THAT WE
26 TALKED ABOUT WITH YOUR HONOR AND THAT WE ARGUED AND THAT YOUR

1 HONOR RULED ON GO TO QUESTIONS THAT ARE RELEVANT TO THE
2 INDIVIDUAL HUMAN BEINGS HERE.

3 JUST TO GIVE EXAMPLES, MR. GODKIN WHEN THERE WERE
4 THESE COMMUNICATIONS WHERE YOU WERE LAYING THE ROADMAP FOR
5 GOVERNMENT ENTITIES AND REPORTERS AS TO WHAT DOCUMENTS THEY
6 SHOULD BE LOOKING FOR AS TO WHAT DOCUMENTS THEY SHOULD BE
7 SERVING SUBPOENAS ON FACEBOOK FOR WHICH WERE THE SUBJECT OF
8 YOUR HONOR'S CAREFUL ORDER. THAT'S NOT SOMETHING THAT THEY
9 NEED SIX4THREE TO LITIGATE. THEY HAVE COUNSEL. THEY'RE
10 REPRESENTED AS YOU CAN SEE TO THE NINES. THEY DON'T NEED
11 SIX4THREE FOR THAT. AND THERE'S NOT A LEGAL ARGUMENT TO
12 SUPPORT THE NOTION THAT SIX4THREE NEEDS TO BE THERE OR IT
13 WOULD NEED TO BE RELITIGATED WHEN SIX4THREE DOES GET COUNSEL.

14 THE COURT: RIGHT. BUT SIX4THREE HAS NO COUNSEL.
15 SIX4THREE'S FORMER ATTORNEYS HAVE COUNSEL.

16 MR. LERNER: CORRECT.

17 THE COURT: THAT'S THE DISTINCTION. SO IF THE
18 CORPORATION IS NOT REPRESENTED BY ITSELF, I THINK THE ANALYSIS
19 STOPS THERE EVEN THOUGH AS A PRACTICAL MATTER YOU HAVE
20 INDIVIDUALS THAT COULD BE SUBJECT TO SOME DISCOVERY. AND I
21 DIDN'T WANT TO DELVE INTO THIS TOO MUCH. BUT FOR THE LAST SIX
22 MONTHS THERE HAVE BEEN DISCUSSIONS BY COUNSEL ABOUT SEEKING
23 RELIEF THROUGH VARIOUS REMEDIES FOR CONTEMPT, FOR EXAMPLE, OR
24 I DON'T KNOW A SEPARATE ACTION OR SOMETHING NOTWITHSTANDING
25 THIS -- THIS CURRENT STATE OF AFFAIRS.

26 BUT UNFORTUNATELY FOR YOU, THAT HASN'T HAPPENED.

1 YOU HAVEN'T FILED ANY PAPERS IN THAT REGARD. AND SO TO FORCE
2 AN ACTION TO BE PURSUED HERE OR AT LEAST RELIEF TO BE PURSUED
3 HERE WITH FACEBOOK AGAINST SIX4THREE AS AN ENTITY
4 UNREPRESENTED BY COUNSEL IN MY OPINION IS IMPROPER.

5 MR. LERNER: UNDERSTOOD.

6 THE COURT: YOU HAVE OTHER REMEDIES. AND FACEBOOK
7 IS LEFT TO THEIR DEVICES TO PURSUE WHATEVER APPROPRIATE
8 REMEDIES THAT THEY MAY PURSUE SHORT OF LITIGATING THIS CASE
9 WITHOUT REPRESENTATION OF SIX4THREE. THIS COURT HAS NO
10 OPINION ON WHAT YOU NEED TO DO. I'M COMMENTING ONLY ON WHAT
11 YOU SAID IN YOUR PAPERS BEFORE.

12 MR. LERNER: UNDERSTOOD, YOUR HONOR. AND TO RESPOND
13 TO YOUR DISTINCTION, WHICH I AGREE WITH, WE -- AND THE LINE I
14 WAS TRYING TO DRAW IF THE POINT IS THEY'RE NOT RESPONDING TO
15 THE RFP'S DIRECTED TO SIX4THREE, UNDERSTOOD. BUT THERE WERE
16 REQUESTS FOR PRODUCTION AND OBVIOUSLY THE DEPO NOTICES THAT
17 ARE NOT DIRECTED TO SIX4THREE. THEY ARE DIRECTED TO FOR
18 EXAMPLE MR. SCARAMELLINO ON THE LEGAL TEAM. HE IS WELL AND
19 TRULY REPRESENTED BY COUNSEL. AND IT'S THAT DISCOVERY THAT WE
20 WOULD LIKE TO PURSUE BECAUSE I THINK THAT IS CONSISTENT WITH
21 THE DISTINCTION THAT YOU DREW. NOW -- AND I WILL STOP THERE
22 FOR A MOMENT.

23 THE COURT: WHAT HAPPENS AND I'VE GOING TO HEAR FROM
24 MR. LEVERONI IN A MOMENT BECAUSE I'M ANXIOUS TO HEAR WHAT
25 MR. LEVERONI HAS TO SAY ON THIS SUBJECT.

26 WHAT HAPPENS IF SIX4THREE HAS COUNSEL AND THEY

1 OBJECT TO THE PURSUIT OF MR. SCARAMELLINO IN THE DISCOVERY
2 THAT YOU ARE ASKING FOR OR THERE MAY BE SOME ISSUES REGARDING
3 BEING A MEMBER OF THE LEGAL TEAM AS HAS BEEN DESCRIBED MANY
4 TIMES BY MR. GODKIN IN THE PAST. THAT IS INEXTRICABLY
5 INTERTWINED WITH SIX4THREE BECAUSE HE'S ALSO A SHAREHOLDER IN
6 SIX4THREE AND AS SUCH SIX4THREE OBJECTS. HOW CAN SIX4THREE
7 OBJECT IF THERE'S NO COUNSEL REPRESENTING SIX4THREE?

8 MR. LERNER: SO -- AND I THINK THIS GOES TO THE
9 REASON I SET THE BACKDROP FOR THIS IS THE ONLY BASIS FOR THAT
10 ARGUMENT WOULD BE AS YOUR HONOR JUST RULED AN IMPROPER ONE,
11 WHICH IS YOUR HONOR HAS ALREADY HEARD AND RULED ON THE SCOPE
12 OF THIS DISCOVERY, MULTIPLE TIMES AND VERY CAREFULLY. AND,
13 AGAIN, THE POINT WAS DURING THAT PERIOD OF TIME AND THIS YOUR
14 HONOR HAS ALSO RULED ON THEY WERE REPRESENTED.

15 SO WHAT YOU'RE GETTING NOW AND THIS IS THE DELAY
16 GAME IS, YES, WE WERE REPRESENTED WHEN WE ARGUED AT LENGTH AND
17 CAREFULLY THAT THERE SHOULD BE NO DISCOVERY. AND WHEN WE
18 ARGUED FOR EXAMPLE THAT THERE SHOULD BE A STAY AND LOST, ALL
19 THAT WAS TRUE.

20 AND WE DID PREDICT THIS. WHEN THEY LOST AND GOT OUT
21 OF THE CASE, THEY NOW SAY, "WELL SOMEBODY ELSE MIGHT LATER
22 DISAGREE WITH YOUR RULINGS." THERE'S NO CASE LAW TO SUPPORT
23 THE IDEA THAT YOU CAN GRIND EVERYTHING TO A HALT WITH RESPECT
24 TO INDIVIDUALS ON THE THEORY THAT ONE DAY SOMEBODY MIGHT
25 DISAGREE WITH AN ISSUED ORDER.

26 IF WE DIDN'T HAVE THE ORDERS ALREADY SAYING THAT

1 THIS DISCOVERY IS APPROPRIATE BASED ON THE CRIME-FRAUD
2 EXCEPTION AND ALREADY OUT THERE, THAT MIGHT BE ONE THING. BUT
3 WE DO. WHAT WE HAVE IS JUST CONTINUED DECISIONS TO IGNORE
4 YOUR HONOR'S ORDERS. THE CURRENT POSITION IS A
5 STRAIGHTFORWARD WE'RE JUST NOT GOING TO FOLLOW YOUR ORDERS.
6 THAT'S WHAT THEY SAID BEFORE THEY WITHDREW AND THAT'S WHAT
7 THEY'RE SAYING AFTER.

8 AND WHEN THEY SAY SOMEBODY MIGHT ONE DAY FILE A WRIT
9 AS I DESCRIBED, THAT AGAIN IS A DELAY GAME. THEY HAVE CURRENT
10 APPELLATE COUNSEL. IF SOMEBODY WERE GOING TO FILE A WRIT,
11 THEY COULD DO IT. SO I THINK THAT'S THE ANSWER ON THE
12 QUESTION THERE WITH RESPECT TO THE DISCOVERY AT ISSUE THAT
13 PERTAINS TO THE INDIVIDUALS AND NOT SIX4THREE.

14 THE COURT: IN THE ORDINARY COURSE OF HAVING AN
15 ANTI-SLAPP MOTION TRIED AND HEARD BEFORE A COURT AND
16 SUBSEQUENT APPELLATE RELIEF, THERE ARE ALSO -- THERE ARE
17 ALWAYS OR USUALLY APPELLATE COUNSEL THAT ARE SEPARATE FROM THE
18 TRIAL COUNSEL TO LITIGATE THE CASE. AND THAT'S BECAUSE TRIAL
19 COURT COUNSEL MAY NOT HAVE THE SAME TYPE OF EXPERTISE AS
20 APPELLATE COUNSEL WOULD IN AN APPELLATE PROCEDURE.

21 SO THOSE APPELLATE COUNSEL ARE SEPARATE AND APART
22 FROM THE TRIAL PORTION OF THE CASE. AND I THINK IT IS A BIT
23 OF A STRETCH TO SAY THAT NOW BECAUSE THE APPELLATE COUNSEL ARE
24 STILL LITIGATING IN THE APPEALS PROCESS THAT THEY SHOULD BE
25 CHARGED WITH THE RESPONSIBILITY OF REPRESENTING SIX4THREE IN
26 THE CONTINUING ACTION THAT IS NOT EMBRACED BY THE APPEAL.

1 SO MR. -- I HAVEN'T HEARD FROM MR. LEVERONI YET.
2 BUT, MR. LERNER, DID YOU HAVE ANYTHING MORE IN RESPONSE TO
3 WHAT I JUST SAID?

4 MR. LERNER: SO WITH RESPECT TO THE APPELLATE
5 COUNSEL POINT WE WERE MAKE SOMETHING IS THEY KEEP ON SAYING
6 FOLKS COULD TAKE A WRIT IF THEY DISAGREED WITH YOUR HONOR'S
7 ORDER.

8 THE COURT: UNDERSTOOD. I UNDERSTAND.

9 MR. LERNER: YEAH. THANK YOU.

10 THE COURT: RIGHT. THANK YOU. MR. LEVERONI.

11 MR. LEVERONI: JUST BRIEFLY, YOUR HONOR. I THINK
12 WE'RE IN AGREEMENT WITH THE COURT'S FIRST WITH RESPECT TO THE
13 ANALYSIS REGARDING THE APPELLATE ISSUE WHICH IS NOT AT ISSUE
14 HERE BEFORE THIS COURT. I DON'T KNOW OF ANY LEGAL BASIS WHERE
15 AS THE COURT SAID WHERE APPELLATE COUNSEL WOULD BE SOMEHOW
16 FORCED TO TAKE ON THESE MATTERS.

17 AND THEN JUST BY WAY OF THE COURT'S EXPLANATION
18 REGARDING THIS ARGUMENT FROM THE DEFENDANT THAT THERE ARE
19 ISSUES THAT CAN BE SEPARATED, WE'RE IN AGREEMENT WITH THE
20 COURT THAT THERE ARE NO ISSUES HERE, NO DISCOVERY THAT COULD
21 BE SEPARATED FROM IN THESE DISCOVERY PROCEEDINGS.

22 AND WITH REGARD TO THE RESPONSIBILITIES IN PLACE,
23 THIS WAS AN EX PARTE FILED ON BEHALF OF BIRNBAUM AND GODKIN
24 JUST FOR THEIR INTEREST. MOST SPECIFICALLY THEIR CONTINUED
25 INTEREST TO A FORMER -- NOW FORMER CLIENT UNDER RULE OF
26 PROFESSIONAL CONDUCT 1.9. AND WE SUBMIT ON THAT, YOUR HONOR,

1 UNLESS THE COURT HAD ANYTHING FURTHER.

2 THE COURT: I DON'T BELIEVE SO. MS. MEHTA.

3 MS. MEHTA: YES, YOUR HONOR. I WANTED TO RAISE
4 SOMETHING IN RESPONSE TO YOUR COMMENTS DURING MR. LERNER'S
5 ARGUMENT WHICH IS, AS YOU SAID, WE HAVE ON A NUMBER OF
6 OCCASIONS ALERTED THE COURT TO THE FACT THAT WE ARE LIKELY TO
7 SEEK CONTEMPT AGAINST A VARIETY OF INDIVIDUALS AND ACTORS IN
8 THE WHAT THE COURT FOUND TO BE THE CRIME THE FRAUD.

9 WE'VE ALSO SAID TO THE COURT THAT WE WILL LIKELY
10 SEEK SOME RELIEF IN THE FORM OF SANCTIONS WHETHER TERMINATING
11 SANCTIONS, MONETARY SANCTIONS OR BOTH.

12 THE QUESTION, WHICH I THINK YOUR HONOR WAS
13 SUGGESTING BUT DIDN'T ASK OUT LOUD IS WHY HAVE WE NOT DONE SO.
14 AND IF WE WERE TO DO SO, WOULDN'T THAT PROVIDE A PATH TO GET
15 TO WHERE WE NEED TO GO? THE ANSWER IS WE DON'T HAVE ALL THE
16 FACTS. AND SO WHAT WE HAVE BEEN ASKING FOR FOR THE LAST SIX
17 MONTHS IS THE DISCOVERY THAT WOULD ALLOW US TO KNOW THE FULL
18 SCOPE OR THE CRIME AND THE FRAUD SO THAT WE COULD THEN BRING
19 THE APPROPRIATE PROCEEDINGS, TERMS OF CONTEMPT, SANCTIONS AND
20 HAVE THE COURT RULE ON THAT WITH THE COMPLETE RECORD.

21 THE PROBLEM WE HAVE NOW IS WE HAVE THE TIP OF THE
22 ICEBERG IN TERMS OF THE DOCUMENTS. AND THEN WE HAVE A VARIETY
23 SELF-SERVING UNTESTED STATEMENTS FROM EVERYONE ON THEIR SIDE.
24 EVERY TIME WE SHOW UP HERE THEY HAVE A VARIETY OF THINGS THEY
25 WANT TO SAY THAT ARE SELF SERVING AND WE'VE HAD NO
26 OPPORTUNITIES TO TEST DOCUMENTS OR CROSS-EXAMINATION. SO WHAT

1 WE HAVE BEEN ASKING FOR DISCOVERY TO GO FORWARD SO WE CAN DO
2 THAT.

3 THE OTHER ALTERNATIVE WHICH JUST OCCURRED TO ME AS
4 YOUR HONOR WAS ASKING THE QUESTION IS WHETHER OR NOT WE COULD
5 DO THIS STEP-WISE AS MR. LERNER SAID. SO ONE IDEA AND I WANT
6 TO MAKE SURE FROM A PROCEDURAL PERSPECTIVE THAT WE'RE NOT
7 GOING TO GET AN OBJECTION AND YOUR HONOR DOESN'T HAVE AN
8 OBJECTION TO THIS. ONE OPTION IS FOR US TO INITIATE CONTEMPT
9 PROCEEDINGS WITHOUT PREJUDICE TO SEEKING THE DISCOVERY IN THIS
10 ACTION AND THEN MOVING FOR SANCTIONS, WHETHER IT'S TERMINATING
11 SANCTIONS, MONETARY SANCTIONS OR BOTH IN THIS ACTION.

12 AND THE REASON I'M ASKING THIS IS BECAUSE ONCE WE
13 START DOWN THAT PATH, I DON'T WANT TO BE IN A POSITION WHERE
14 WE'RE PRECLUDED FROM GETTING ALL OF THE RELIEF TO WHICH WE'RE
15 ENTITLED. BUT WE'RE HAPPY TO GO STEP-WISE IF THAT'S THE WAY
16 THIS BALL IS GOING TO MOVE FORWARD. WE CAN'T BE IN A POSITION
17 WHERE SIX MONTHS IN NOTHING IS HAPPENING AND THEY HAVE NO
18 INCENTIVE ON THEIR SIDE TO GET COUNSEL AND NO INCENTIVE TO
19 MOVE THINGS FORWARD WHICH IS ALL THIS HAS BEEN SO FAR. A
20 SHELVE GAME TO SHELVE ANY INVESTIGATION INTO THE CRIME OF THE
21 FRAUD. THAT'S WHY I WANTED TO RAISE THAT. AND IF THAT IS A
22 PROCESS BY WHICH WE'RE NOT GOING TO GET AN ARGUMENT THAT WE'RE
23 PRECLUDED FROM BRINGING THE ULTIMATE REQUEST FOR RELIEF FOR
24 TERMINATING MONETARY SANCTIONS, THEN WE'RE PREPARED TO
25 INITIATE CONTEMPT PROCEEDINGS NEXT WEEK.

26 THE COURT: MR. LEVERONI, RESPONSE OR, MR. MURPHY,

1 ANY RESPONSE TO THIS?

2 MR. MURPHY: WELL, SOUNDS TO ME THEY'RE ASKING FOR
3 AN ADVISORY OPINION FROM THE COURT AS TO WHAT THEY SHOULD DO.
4 IF THEY'RE GOING TO DO ANYTHING, THEY SHOULD MAKE THE DECISION
5 STRATEGICALLY AND PURSUE IT. I JUST WANT TO COMMENT I TAKE
6 PERSONAL OFFENSE TO THE STATEMENT THAT WE THREATEN WRITS AND
7 WE'RE NOT PURSUING THEM.

8 WE HAVE A LEGAL STRATEGY. IF OUR LEGAL STRATEGY IS
9 TO PURSUE A WRIT AND WE STATE WE WILL PURSUE A WRIT, WE WILL
10 PURSUE A WRIT. BUT WE WILL DO IT AT THE APPROPRIATE TIME
11 AFTER THE MATTER HAS BEEN PROPERLY SET FORTH IF NECESSARY TO
12 PURSUE A WRIT. WE DID PURSUE A WRIT IN THIS CASE AS THE COURT
13 WELL KNOWS. SO THESE ARE NOT IDLE THREATS. IF I MAKE A
14 STATEMENT, I'M GOING TO FOLLOW THROUGH ON IT. THANK YOU, YOUR
15 HONOR.

16 MS. MEHTA: AND, YOUR HONOR, ON THAT POINT, NEXT
17 WEDNESDAY IS THE TWO-MONTH MARK FROM THE DATE ON WHICH YOUR
18 HONOR ISSUED THE CRIME-FRAUD RULING AND NO WRIT HAS BEEN
19 TAKEN. NO STEPS HAVE BEEN TAKEN TO MOVE THINGS FORWARD.
20 INSTEAD WHAT WE HAVE IS THE CONSTANT SUGGESTION THAT
21 EVERYTHING NEEDS TO WAIT. EVERYTHING NEEDS TO WAIT. WE NEED
22 DUE PROCESS. WE NEED TIME. WE NEED MORE TIME.

23 WHAT ABOUT THE DUE PROCESS FOR FACEBOOK? IT HAS
24 BEEN SIX MONTHS. THIS MONTH IS THE SIX-MONTH MARK FROM WHEN
25 THESE DOCUMENTS WERE BREACHED. AS YOUR HONOR NOTED EARLIER,
26 DOCUMENTS CONTINUE TO BE LEAKED. IT CONTINUES TO BE OUT THERE

1 IN THE PRESS. AND THEIR ATTEMPT TO CONTINUE TO DELAY THINGS
2 AND THEIR CONSTANT SUGGESTION THAT WE WILL DEAL WITH IT
3 TOMORROW. IT'S COMING. IT'S COMING. IT IS COMPLETELY AT
4 ODDS WITH WHAT WE'RE ASKING FOR WHICH IS AN INVESTIGATION INTO
5 WHAT HAPPENED. AND IT'S NOTABLE THAT WHEN I SUGGESTED A PATH
6 TO MOVE THE INVESTIGATION FORWARD AND I ASKED WHETHER THEY
7 WERE GOING TO BE ARGUING LATER IF WE DID SOMETHING NOW, WE
8 WOULD BE PRECLUDED IN THE FUTURE, THEY DIDN'T AGREE WE COULD
9 MOVE FORWARD NOW AND PROCEED WITH THE REST OF THE PROCEEDING
10 LATER.

11 THAT'S THE WHOLE POINT. THEY CONTINUE TO TRY TO
12 MOVE THINGS DOWN THE ROAD BY PUTTING EVERYTHING ON ICE. ALL
13 WE'RE ASKING FOR, YOUR HONOR, IS THE DISCOVERY WHERE THE
14 REPRESENTATION OF SIX4THREE DOESN'T MATTER. WE CAN DO THIS IN
15 STEPS. IF THERE ARE PARTICULAR THINGS THAT INVOLVE ASSERTIONS
16 OF PRIVILEGE BY SIX4THREE, FOR EXAMPLE, THOSE THINGS CAN BE
17 DONE AFTER THE PARTY IS REPRESENTED.

18 BUT THERE ARE THINGS THAT CAN BE DONE NOW. FOR
19 EXAMPLE, WE HAVE MR. KRAMER'S AND MR. SCARAMELLINO'S DATA
20 PRESERVED. IT IS IN THE HANDS OF THE NEUTRAL FORENSIC
21 EXAMINER. THOSE COMMUNICATIONS WILL INCLUDE COMMUNICATIONS OF
22 THIRD PARTIES THAT COULD NEVER BE PRIVILEGED. IT DOESN'T
23 MATTER WHETHER SIX4THREE HAS COUNSEL OR NOT. THEY COULD HAVE
24 THE WORLD'S GREATEST COUNSEL, THEY'RE NOT GOING TO BE ABLE TO
25 ASSERT PRIVILEGE OVER COMMUNICATIONS BETWEEN MR. KRAMER AND
26 THE PRESS OR MR. SCARAMELLINO AND THE PRESS. WHY DON'T WE

1 START THE PROCESS OF GETTING ALL OF THOSE DOCUMENTS PRODUCED?
2 THERE ARE THINGS WE CAN DO NOW.

3 THE COURT: MR. LEVERONI.

4 MR. LEVERONI: JUST BRIEFLY, YOUR HONOR. I JUST
5 CAN'T -- AS THE COURT ALREADY PROVIDED EXAMPLES, I CAN'T
6 IMAGINE DISCOVERY WHERE IT WOULD BE PROPER TO GO FORWARD WITH
7 IT WHERE THE PLAINTIFF IN THIS MATTER IS NOT REPRESENTED. THE
8 FACT THE ARGUMENT THAT THERE'S SOMEHOW DISCOVERY THAT COULD
9 PROCEED WITHOUT THE PLAINTIFF ITSELF BEING REPRESENTED, I
10 DON'T KNOW THE BASIS FOR THAT.

11 THE COURT: IT COULD BE WORK PRODUCT MATTERS FOR
12 THIS. THAT'S ONE EXAMPLE. OBJECTIONS THE PLAINTIFFS MAY BE
13 MAKING AND OTHERS, BUT THE PLAINTIFF IS NOT PRESENT AND THE
14 PLAINTIFF IS NOT REPRESENTED.

15 MS. MEHTA: WE CAN -- BUT MY POINT, YOUR HONOR, IS
16 YOU ARE CORRECT THAT THEY COULD MAKE A WORK PRODUCT OBJECTION.
17 ALTHOUGH I THINK WITHIN THE SCOPE OF THE CRIME-FRAUD RULING
18 WOULDN'T APPLY. MY POINT IS IF THERE IS AN EMAIL BETWEEN
19 MR. KRAMER AND A REPORTER, THEY ARE NOT GOING TO BE ABLE TO
20 ASSERT PRIVILEGE OR WORK PRODUCT OVER THAT. AND THAT'S
21 SOMETHING THAT AGAIN COULD JUST DO A SEARCH FOR AND SPIT OUT
22 THE RESULTS. THEY KNOW THE TO AND THE FROM ADDRESS FOR AN
23 EMAIL AND THEY COULD FIND ALL OF THE EMAILS DIRECTED TO MEDIA
24 AND TO THE ENTITIES WHERE THERE CANNOT BE ANY ASSERTION OF
25 WORK PRODUCT. AND WE COULD START TO GET A PICTURE OF WHAT IT
26 IS THAT WAS GOING ON.

1 THE COURT: ALL RIGHT. ANYTHING FURTHER?

2 MR. MURPHY: NO, YOUR HONOR.

3 THE COURT: OKAY. THANK YOU. THE COURT BELIEVES
4 THAT SIX4THREE NEEDS TO BE REPRESENTED BY COUNSEL. AND IT
5 WOULD BE HAIR SPLITTING, CREATED HAIR SPLITTING FOR THE COURT
6 TO ALLOW CONTINUED DISCOVERY WHEN THE MAJOR PLAINTIFF IN THIS
7 CASE IS NOT REPRESENTED. THIS IS NOT A SEPARATE ACTION
8 NOTWITHSTANDING FACEBOOK WHERE ITS MAINTAINED AGAINST
9 INDIVIDUALS. THAT'S NOT WHAT WE HAVE HERE. AND THAT'S WHAT
10 YOU ARE PURPORTING TO DO. YOUR POSITION IS THAT YOU CAN
11 MAINTAIN AN ACTION, THIS ACTION AGAINST INDIVIDUALS AND THAT
12 DISCOVERY CAN BE CONDUCTED AS TO THESE INDIVIDUALS EVEN IN THE
13 FACE OF ONE OF THE MAJOR PARTIES OR THE PARTY ON THE
14 PLAINTIFFS' SIDE IS NOT REPRESENTED BY COUNSEL.

15 I DON'T BELIEVE THAT IT'S APPROPRIATE FOR DISCOVERY
16 TO PROCEED EVEN THOUGH THERE IS INFORMATION THAT IS STILL
17 CIRCULATING OUT THERE. ONE OF THE THINGS THAT THIS COURT HAS
18 NOT HEARD FROM COUNSEL FOR BIRNBAUM AND GODKIN IS -- OR FROM
19 COUNSEL FOR MR. SCARAMELLINO AND MR. KRAMER IS THAT THE
20 ELEPHANT IN THE ROOM IS THE BREACH OF THIS AGREEMENT AND THE
21 DATA FLOWING OUT IN THE PUBLIC DOMAIN FLOWING FROM THOSE
22 PROTECTIVE ORDERS THAT WERE VIOLATED.

23 THAT'S WHY WE'RE HERE. THAT'S WHY WE CONTINUE TO
24 HAVE THESE MOTIONS. NOW, NO ONE HAS TALKED ABOUT IT. I JUST
25 SAID AT THE OUTSET THAT IT'S NOT RIGHT TO DO THAT. I DON'T
26 KNOW HOW MUCH MORE I CAN SAY ABOUT THE APPROPRIATENESS OF

1 HAVING CONTINUED DATA BEING CIRCULATED IN THE DOMAIN WHEN THE
2 EXPRESSED PURPOSE OF THOSE PROTECTIVE ORDERS WAS TO PROTECT
3 THAT FROM HAPPENING. NO MATTER HOW UNPOPULAR THAT PROTECTED
4 PARTY IS.

5 I HEARD MR. RUSSO SAY IN ESSENCE IT'S BECAUSE OF
6 FACEBOOK BEING WHO FACEBOOK IS BEING UNPOPULAR THESE ARE NOT
7 HIS WORDS BUT THE INFERENCE OF WHAT I'M SAYING WAS EXPRESSED
8 BY MR. RUSSO THAT THEY'RE A BIG BULLY. YOU COULD BULLY UP ON
9 THEM. THE NATURE OF THE CASE IS CHANGED NOW. HE ESSENTIALLY
10 SAID THOSE WORDS SITTING RIGHT THERE IN THE JURY BOX NEXT TO
11 THE PLAINTIFFS' COUNSEL PORTION OF THE TABLE. THAT'S WHAT HE
12 SAID. AM I INCORRECT OF MY PERCEPTION OF WHAT MR. RUSSO SAID,
13 COUNSEL, ANYBODY?

14 MR. LERNER: NO, YOUR HONOR.

15 MR. SARGENT: I DO THINK THAT'S INCORRECT.

16 THE COURT: WHAT EXACTLY DID HE SAY? I COULD CALL
17 IT UP ON MY REALTIME.

18 MR. SARGENT: THIS IS A HEARING I WASN'T AT. I
19 HAVEN'T BEEN AT ALL THE HEARINGS. IT WOULD SURPRISE ME IF
20 MR. RUSSO SAID THAT PEOPLE COULD VIOLATE THE PROTECTIVE ORDER
21 BECAUSE FACEBOOK --

22 THE COURT: HE DID NOT SAY THAT. HE DID NOT SAY
23 THAT. HE DID NOT SAY THAT PEOPLE COULD VIOLATE THE PROTECTIVE
24 ORDER. DON'T MISUNDERSTAND ME. WHAT HE DID SAY WAS HE
25 COMMENTED ON THE UNPOPULARITY OF FACEBOOK AND THEIR CONDUCT
26 INVOLVING MATTERS THAT ARE PERIPHERAL TO THIS AND IN SOME WAYS

1 WHAT THE INDIVIDUALS THAT ENDED UP ALLOWING THIS INFORMATION
2 TO GET OUT WERE PURSUANT TO MY MARCH 15TH ORDER TOYING WITH
3 DISCLOSING TO THE MEDIA.

4 MR. SARGENT: MY UNDERSTANDING, IF I REMEMBER
5 CORRECTLY, MR. RUSSO'S POINT IS THAT ONE OF THE ISSUES THAT
6 HASN'T BEEN ADDRESSED IS BECAUSE FACEBOOK HASN'T FILED A
7 SUBSTANTIVE MOTION YET FOR CONTEMPT OR ANYTHING LIKE THAT IS
8 THERE'S A SIGNIFICANT ISSUE HERE ON WHETHER OR NOT SECTION 16
9 OF THE PROTECTIVE ORDER WAS ACTUALLY FOLLOWED BY IT GIVING
10 PRIOR NOTICE TO FACEBOOK REGARDING ALL OF THIS. SO I'M
11 SPECULATING, NOT FROM MEMORY BECAUSE I DON'T REMEMBER WHAT
12 YOUR HONOR IS REFERRING TO THAT WOULD BE WHAT MR. RUSSO WAS
13 TALKING ABOUT. THE NEED TO ADDRESS THAT ISSUE AROUND SECTION
14 16 AND THE LACK OF ANY SUBSTANTIVE REQUEST FOR RELIEF FROM
15 FACEBOOK TODAY THAT PUT SOME PARAMETERS, DECISIONS COULD BE
16 MADE ABOUT THESE THINGS INCLUDING FOR EXAMPLE THE
17 APPROPRIATENESS OF A DISCOVERY HEARING, IF THAT'S EVER ALLOWED
18 TO PROCEED.

19 THE COURT: ALL RIGHT.

20 MR. LERNER: VERY QUICKLY, YOUR HONOR. I THINK AND
21 I UNDERSTAND WHY IT'S HAPPENED THAT THERE IS SERIOUS CONFUSION
22 ABOUT WHAT WE'RE DOING HERE. THERE'S NOT TO ANSWER YOUR
23 QUESTION AN ACTION THAT WE ARE PURSUING AGAINST THE
24 INDIVIDUALS, THERE IS AS IT OCCURS IN CASES WHERE THERE IS A
25 VIOLATION OF THE PROTECTIVE ORDER DISCOVERY DIRECTED TO THE
26 SCOPE OF THE VIOLATIONS. AND YOUR HONOR HAS BEEN INCREDIBLY

1 CAREFUL AND DILIGENT AFTER THE HEARINGS IN LOOKING INTO
2 THINGS. AND WHAT I WOULD URGE YOU TO LOOK AT IS THE APPLE
3 SAMSUNG DECISION FROM MAGISTRATE JUDGE GREWAL THAT WE
4 SUBMITTED WITH OUR PAPERS WHEN YOU LIFTED THE STAY. AND THAT
5 IS AN OPINION THAT REFLECTS WHAT JUDGES OFTEN DO WITH THE
6 DISCOVERY THAT PERTAINS TO A VIOLATION OF THE PROTECTIVE
7 ORDER. IT IS NOT A SEPARATE ACTION. IT IS NOT A SEPARATE
8 CASE AGAINST THE INDIVIDUALS. IT IS AN ACTION THAT JUDGES
9 LOOK AT IN ORDER TO DETERMINE THE SCOPE OF THE VIOLATIONS OF
10 THEIR ORDERS.

11 AND IN THAT CASE WHAT YOU HAD WITH A VIOLATION THAT
12 PALES IN COMPARISON TO WHAT WE HAVE HERE, PALES, WAS A MOTION
13 FOR DISCOVERY WHICH WAS GRANTED AS TO INDIVIDUALS THAT WAS
14 FOLLOWED WITH DOCUMENT DISCOVERY AND DEPOSITIONS. IT DID NOT
15 REQUIRE A SEPARATE ACTION NOR ARE WE AWARE OF CASES INCLUDING
16 THE CASES, BY THE WAY, THAT MR. RUSSO CITED TO YOU WITH THE
17 POLICE TAPE, WHICH YOU WILL REMEMBER HE SAID, "YOU SHOULD GO
18 LOOK AT THAT ONE. IT'S LIKE THIS."

19 WELL, IF THAT'S THE MEASURE WHICH PLAINTIFFS'
20 COUNSEL HAVE REPRESENTED TO YOU, THAT'S HOW THIS SHOULD BE
21 DONE, JUDGE COUSINS DID NOT THERE SUGGEST THAT WHAT WE'RE
22 DOING HERE WOULD BE IMPROPER THAT JUDGE GREWAL'S APPROACH WAS
23 WRONG OR ANYTHING ELSE. THE WAY THAT JUDGE GREWAL DID THIS IS
24 COMMON AND APPROPRIATE. IT DOESN'T NEED TO BE A SEPARATE
25 ACTION. IF IT DID, THEN WHAT POWER WOULD JUDGES HAVE IN A
26 SCENARIO LIKE THIS IF THEY WANTED TO GET TO THE BOTTOM OF THE

1 VIOLATIONS OF THEIR ORDERS? PEOPLE WOULD ALWAYS SAY YOU CAN'T
2 DO ANYTHING UNTIL YOU FILE FOR CONTEMPT.

3 THE COURT: EXCEPT FOR ONE THING. ONE OF THE MAJOR
4 PARTIES IN THE CASE IS NOT REPRESENTED BY COUNSEL. I DON'T
5 BELIEVE THE APPLE AND SAMSUNG CASE ADDRESSES THAT PARTICULAR
6 ISSUE.

7 MR. MURPHY: I ASSUME APPLE AND SAMSUNG HAD COUNSEL.

8 THE COURT: I'M ASSUMING THAT'S CORRECT.

9 MR. LERNER: THEY DID HAVE COUNSEL, YOUR HONOR. AND
10 THE ISSUE WHICH HAS BEEN RAISED HERE OVER AND OVER AGAIN IS
11 THAT IN THAT CASE WITH RESPECT TO THE VIOLATION OF THE ORDERS,
12 THAT WOULDN'T HAVE MATTERED TO THE DISCOVERY THAT WAS DIRECTED
13 BY THE COURT. I UNDERSTAND THE POINT. THE ONLY OTHER ISSUE
14 THAT I WANT TO MAKE SURE I RAISE IN THE TIME HERE IS THAT WE
15 ALSO DO HAVE ONE SCHEDULING CONFLICT FOR THE 6/28 HEARING.

16 THE COURT: YES.

17 MR. LERNER: NEITHER MS. MEHTA NOR I ARE IN TOWN
18 DURING THAT HEARING. AND SO I WANTED TO MAKE SURE TO NOT LET
19 THAT SLIP THROUGH THE CRACKS. IF THERE'S ANYTHING, WE'RE
20 HAPPY TO CONFER WITH THE OTHER COUNSEL TO PROPOSE A DATE.
21 WE'RE HAPPY TO WORK WITH YOUR HONOR NOW. BUT THAT WE WANTED
22 TO FLAG FOR THE COURT RATHER THAN RAISING IT LATE.

23 THE COURT: RIGHT. THE COURT WILL TAKE A LOOK AT
24 ITS CALENDAR AND WILL LOOK FOR ALTERNATIVE DATES. HAVE
25 COUNSEL CONCLUDED THEIR ARGUMENTS WITH REGARD TO THE ISSUES ON
26 THE EX PARTE MOTION FOR RELIEF APPLICATION FOR RELIEF?

1 MR. LEVERONI: YES, YOUR HONOR.

2 THE COURT: VERY WELL. SUBMITTED, COUNSEL?

3 MS. MEHTA: YES, YOUR HONOR.

4 THE COURT: THE COURT HAVING HEARD THE ARGUMENTS OF
5 COUNSEL AND HAVING REVIEWED THE MOVING PAPERS, THE EX PARTE
6 APPLICATION AND THE CORRESPONDING DECLARATIONS, HEREBY ADOPTS
7 ITS TENTATIVE RULING AS ANNOUNCED AT THE BEGINNING OF THIS
8 HEARING. THE TENTATIVE RULING THAT I ANNOUNCED IS ADOPTED IN
9 ITS TOTALITY. AND GIVEN THAT COUNSEL FOR BIRNBAUM AND GODKIN
10 ARE THE MOVING PARTY, COUNSEL FOR BIRNBAUM AND GODKIN SHOULD
11 BE PREPARING THE ORDER CONSISTENT WITH MY RULING.

12 MR. MURPHY: YES, YOUR HONOR.

13 THE COURT: IT IS UNFORTUNATE IF THE REPRESENTATIONS
14 OF FACEBOOK'S COUNSEL ARE CORRECT THAT MATTERS CONTINUE TO BE
15 LEAKED. THE COURT HAS ALREADY COMMENTED ON THIS WITHIN THE
16 FOUR CORNERS OF THIS LAWSUIT AND THE ARGUMENTS THAT HAVE BEEN
17 MADE. AND I'VE ALSO ISSUED ORDERS FORBIDDING THE PARTIES OR
18 ANYONE THAT HAS THIS INFORMATION THAT'S SUBJECT TO MY
19 JURISDICTION TO RELEASE PROTECTED INFORMATION BY THE
20 PROTECTIVE ORDER AND THE MOTIONS TO SEAL.

21 THANK YOU VERY MUCH, EVERYONE.

22 MR. MURPHY: THANK YOU.

23 MS. MEHTA: THANK YOU, YOUR HONOR.

24 THE COURT: ALL RIGHT. SO I'M GOING TO TAKE A BREAK
25 NOW FOR ESTABLISHING A DATE. I NEED TO LOOK AT MY CALENDAR,
26 BUT THAT'S MY ORDER. OKAY. SO WE'RE LOOKING AT A HEARING

1 DATE FOR THE CMC. AND THIS IS THE STATUS CONFERENCE TO
2 DETERMINE APPOINTMENT OF NEW COUNSEL. CORRECT?

3 MS. MEHTA: YES, YOUR HONOR.

4 THE COURT: ALL RIGHT. IT IS A CMC, RIGHT?

5 MS. MEHTA: YES, YOUR HONOR.

6 THE COURT: AND TO DETERMINE THE STATUS OF
7 APPOINTMENT OF NEW COUNSEL.

8 MR. LEVERONI: YES.

9 THE COURT: JUNE 7TH.

10 MS. MEHTA: THAT WORKS GREAT, YOUR HONOR.

11 THE COURT: AT 2:00 P.M. DOES THAT WORK FOR
12 EVERYONE?

13 MR. MURPHY: CMC. JUST FOR THE STATUS OF
14 APPOINTMENT OF COUNSEL. I DON'T THINK WE NEED TO BE THERE SO.

15 THE COURT: VERY WELL. I WILL LEAVE THAT UP TO YOU.

16 MR. MURPHY: YOUR HONOR, WE'LL GET SOMEONE TO COVER.
17 IT DOESN'T SEEM TO ME THAT OUR INVOLVEMENT IS GOING TO REQUIRE
18 A SPEAKING PART.

19 THE COURT: NO, I UNDERSTAND. I UNDERSTAND. LET ME
20 SAY ONE MORE THING BEFORE WE ADJOURN. MR. MURPHY, I DID NOT
21 INTEND TO IRRITATE YOU OR TO OFFEND YOU WITH REGARD TO THE
22 COMMENTS ABOUT FILING A WRIT AND SO FORTH BEFORE. I WAS ONLY
23 SAYING THAT IN RELATION TO THE MATTERS BEFORE THE COURT WHICH
24 ARE THAT NEITHER PARTY IS REALLY DOING ANYTHING IN THE CASE.

25 MR. MURPHY: AND FOR CLARIFICATION, YOUR HONOR, I
26 WASN'T REFERRING TO YOU. I WAS REFERRING TO COUNSEL.

1 THE COURT: YES. ALL RIGHT.

2 MR. MURPHY: NO OFFENSE TAKEN BY THE WAY.

3 THE COURT: ALL RIGHT. THE ORDER WILL HAVE THE
4 NEW HEARING DATE FOR THE CMC. AND THAT'S JUNE 7TH AT
5 2:00 O'CLOCK P.M. THE COURT WILL INDEPENDENTLY LOOK AT THE
6 CASE LAW THAT HAS BEEN CITED AND WILL ISSUE ANY RULINGS IF IT
7 THINKS IT IS NECESSARY, BUT I JUST DON'T THINK THAT WE CAN
8 PROCEED WITHOUT HAVING COUNSEL.

9 MR. MURPHY: YOUR HONOR.

10 THE COURT: YES.

11 MR. MURPHY: PERHAPS THE COURT SHOULD INSTRUCT
12 COUNSEL FOR FACEBOOK TO GIVE NOTICE OF THAT CHANGE BECAUSE
13 SIX4THREE IS NOT PRESENT. AND I THINK THEY NEED FORMAL
14 NOTICE. RATHER THAN HAVING IT IN THE ORDER, I WOULD SUGGEST
15 THAT PERHAPS COUNSEL PROVIDE WRITTEN NOTICE TO SIX4THREE.

16 THE COURT: WITH REGARD TO THE CMC?

17 MR. MURPHY: WITH REGARD TO THE CMC BECAUSE IT'S
18 BEING ADVANCED.

19 THE COURT: OKAY. I GUESS THAT WILL BE A SEPARATE
20 ORDER THEN. THEY WILL PREPARE THE ORDER ADVANCING THE CMC
21 GIVEN THAT THEY REQUESTED A CHANGE IN THE DATE. AND FACEBOOK
22 COUNSEL WILL BE RESPONSIBLE FOR GIVING NOTICE --

23 MS. MEHTA: YES, YOUR HONOR.

24 THE COURT: -- TO SIX4THREE. AND I THINK ALSO IT'S
25 LITTLE AWKWARD GIVEN THAT BIRNBAUM GODKIN HAS IN ESSENCE
26 AVAILED ITSELF OF SEEKING RELIEF HERE. AND IT'S ALMOST AS IF

1 BIRNBAUM AND GODKIN IS TRYING TO HAVE IT BOTH WAYS. I
2 UNDERSTAND THE TECHNICALITIES AND I RULED ACCORDINGLY. BUT
3 PERHAPS NOTICE CAN BE GIVEN TO BOTH YOUR FIRM AND BIRNBAUM AND
4 GODKIN AS WELL AS TO FACEBOOK'S PRINCIPAL TO SATISFY THE
5 CHANGE IN THE CMC DATE.

6 MR. MURPHY: THAT'S FINE, YOUR HONOR. I'M JUST
7 CONCERNED ABOUT TIMING BECAUSE WE WANT TO GET A COPY OF THE
8 TRANSCRIPT SO THE ORDER IS CORRECTLY REFLECTED IN WHAT THE
9 COURT RULED TENTATIVELY.

10 THE COURT: UNDERSTOOD. AND IT IS KIND OF A SHORT
11 TURNAROUND. LET ME ASK OFF THE RECORD WHETHER THAT CAN
12 HAPPEN.

13 (DISCUSSION OFF THE RECORD.)

14 MR. LERNER: MR. KRAMER'S COUNSEL IS HERE. HE IS
15 THE REGISTERED AGENT FOR SIX4THREE. WE, A, THAT SEEMS TO ME
16 THAT SHOULD BE A SIMPLE SOLUTION TO ALL OF THIS SINCE HIS
17 COUNSEL IS HERE. B, IF IT'S NOT, I WOULD LIKE TO FLAG THE
18 FACT WHEN WE HAVE TRIED TO SERVE ANYTHING RELATED TO THE
19 PRINCIPAL OR INVESTORS IN SIX4THREE IF IT'S MR. KRAMER, WE'VE
20 BEEN ACCUSED OF HARASSMENT. AND IF IT'S MR. SCARAMELLINO, WE
21 HAVE TRIED NOW FOR A MONTH TO AFFECT SERVICE ANYWHERE HIS
22 BUSINESS OR HIS HOME AND THEY STILL WON'T ACCEPT SERVICE.

23 SO WE WILL DO OUR LEVEL BEST TO AFFECT NOTICE, BUT
24 WE DON'T WANT THERE TO BE ANY SECRET ABOUT THE FACT THAT --
25 MR. KRAMER'S COUNSEL IS HERE. HE'S HEARD IT. AND IF THEY
26 OBJECT OR SAY WE CAN'T GET IT OR WE WON'T ACCEPT THE NOTICE,

1 WE WILL TRY. BUT HE'S HERE AND HE'S HEARD IT.

2 THE COURT: MS. MEHTA.

3 MS. MEHTA: YES, YOUR HONOR. THE REQUEST IS THAT
4 MR. KRAMER'S PERSONAL COUNSEL PROVIDE AND FILE WITH THE COURT
5 A NOTICE WITH MR. KRAMER'S ADDRESS SO THAT BOTH THE PARTIES TO
6 THE LITIGATION, THE THIRD PARTIES AND THE COURT HAVE A PROPER
7 ADDRESS BY WHICH HE CAN BE DEEMED SERVED. SO THAT WE DON'T
8 HAVE ANY ARGUMENTS LATER THAT SERVICE ON SIX4THREE WAS NOT
9 AFFECTED DURING THE INTERIM PERIOD BEFORE NEW COUNSEL
10 APPEARED.

11 THE COURT: MR. SARGENT.

12 MR. SARGENT: I DON'T HAVE ANY OBJECTION TO FILING A
13 NOTICE TO MR. KRAMER'S ADDRESS.

14 THE COURT: VERY WELL. THE COURT IS HEREBY --

15 MR. MURPHY: YOUR HONOR. YOUR HONOR.

16 THE COURT: YES, SIR.

17 MR. MURPHY: HERE IS A PROOF OF SERVICE FROM
18 MR. RUSSO'S OFFICE. THEODORE KRAMER, 1267 CHESTNUT STREET,
19 APARTMENT 6, SAN FRANCISCO, CALIFORNIA 94109.

20 MR. LERNER: IT'S INTERESTING THAT PEOPLE ARE ALWAYS
21 TALKING ABOUT BEING OFFENDED. IT'S NOT MY GAME TO DO THAT, SO
22 I'M NOT GOING TO DO IT HERE. I'M NOT SURE WHY YOU ARE MAKING
23 THIS ARGUMENT. SO THAT YOU HAVE THE BACKGROUND, WE HEARD FROM
24 MR. RUSSO THAT MR. SCARAMELLINO HAS AN ADDRESS WHERE
25 MR. SCARAMELLINO HAS NOT BEEN. SO WHAT MR. RUSSO SAYS ABOUT
26 ADDRESSES ISN'T HELPFUL TO US. WHAT MS. MEHTA OUTLINED AND

1 WHAT COUNSEL FOR MR. KRAMER AGREED TO WOULD BE HELPFUL TO US.

2 MR. MURPHY: ALL RIGHT. I'M JUST TRYING TO ASSIST
3 THE COURT.

4 THE COURT: I UNDERSTAND, MR. MURPHY AND MR. LERNER.
5 I'M ORDERING THAT COUNSEL FOR MR. KRAMER TO FURNISH
6 MR. KRAMER'S CONTACT INFORMATION. THAT IS HIS ADDRESS SO THAT
7 HE COULD BE PROPERLY SERVED WITH NOTICE OF THE ADVANCEMENT OF
8 THE CASE MANAGEMENT CONFERENCE TO JUNE 7TH, 2019 --

9 MR. LERNER: THANK YOU, YOUR HONOR.

10 THE COURT: -- AT 2:00 O'CLOCK P.M. FOR THE PURPOSE
11 OF THE NOTICE, MR. SCARAMELLINO'S ADDRESS IS NOT NECESSARY.
12 THE COURT HAD ONCE CAUSED MR. SCARAMELLINO TO BE CONTACTED AND
13 THE CONTACT INFORMATION WAS PROVIDED AT THAT TIME. I DON'T
14 KNOW THAT IT'S APPROPRIATE AT THIS JUNCTURE TO ADDRESS THAT
15 ISSUE BECAUSE THIS IS A MERE SERVICE ON THE CORPORATION OR ITS
16 PRINCIPAL. OKAY. THANK YOU VERY MUCH, EVERYONE.

17 MR. LEVERONI: THANK YOU, YOUR HONOR.

18 THE COURT: THAT'S GOING TO BE REFLECTED. WHO IS
19 GOING TO PREPARE THE ORDER?

20 MR. LERNER: THE ADDRESS WOULD COME FROM
21 MR. SARGENT.

22 THE COURT: NO. BUT THE ORDER.

23 MR. LERNER: YES.

24 THE COURT: THANK YOU, EVERYBODY.

25 MR. LERNER: THANK YOU.

26 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

STATE OF CALIFORNIA)

) SS.

COUNTY OF SAN MATEO)

I, GERALDINE VANDEVELD, OFFICIAL COURT REPORTER,
COUNTY OF SAN MATEO, STATE OF CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING CONTAINS A TRUE, FULL AND CORRECT
TRANSCRIPT OF THE PROCEEDINGS GIVEN AND HAD IN THE
WITHIN-ENTITLED MATTER THAT WERE REPORTED BY ME AT THE TIME
AND PLACE MENTIONED AND THEREAFTER TRANSCRIBED BY ME OR AT MY
DIRECTION INTO LONGHAND TYPEWRITING AND THAT THE SAME IS A
CORRECT TRANSCRIPT OF THE PROCEEDINGS.

DATED: MAY 16, 2019

GERALDINE VANDEVELD, C.S.R. #8634
OFFICIAL COURT REPORTER

EXHIBIT 7

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

***SIX4THREE, LLC, a Delaware Limited
Liability Company,***

PLAINTIFF,

vs.

***FACEBOOK, INC., a Delaware
Corporation, et. al.,***

DEFENDANTS.

**NON-CERTIFIED
TRANSCRIPT**

Case No. CIV533328

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE: HONORABLE RAYMOND V. SWOPE, JUDGE

DEPARTMENT []

JULY 19, 2019

A P P E A R A N C E S:

FOR THE PLAINTIFF: MACDONALD FERNANDEZ, LLP
By: Reno Fernandez, Esq.
221 Sansome Street, 3rd Fr.
San Francisco, CA 94104

FOR THE DEFENDANTS: DURIE TANGRI
By: Sonal N. Mehta, Esq.
Josh Lerner, Esq.
Cat Kim, Esq.
Laura Miller, Esq.
Zach Abrahamson, Esq.
217 Leidesdorff Street
San Francisco, CA 94111
(Also present: Natalie Nagle)

FOR THE INDIVIDUALS: ENTREPRENEUR LAW GROUP, LLP
By: Jack Russo, Esq.
401 Florence Street
Palo Alto, CA 94301

FOR THE NON-PARTY: MURPHY PEARSON BRADLEY&FEENEY
By: James A. Murphy, Esq.
88 Kearney Street, 10th Fl.
San Francisco, CA 94108

REPORTED BY: CINDY DEL ROSARIO, CSR NO. 11409, RPR, CCRR 094

1 REDWOOD CITY, CALIFORNIA JULY 19, 2019

2 PM SESSION

3 P R O C E E D I N G S

4 * * * * *

5 THE COURT: Good afternoon, everyone.

6 Calling Case No. CIV533328, the matter
7 of Six4Three, LLC, versus Facebook Inc. et al.

8 Will counsel please state their
9 appearances for the record.

10 MR. FERNANDEZ: Good morning, your
11 Honor.

12 Reno Fernandez for Plaintiff Six4Three
13 LLC. Good afternoon, I mean.

14 THE COURT: Good afternoon.

15 MR. RUSSO: Good afternoon, your Honor.
16 Jack Russo for the Individuals.

17 THE COURT: Good afternoon.

18 MR. MURPHY: Good afternoon, your Honor.
19 James Murphy on behalf of the non-party,
20 Birnbaum Godkin.

21 THE COURT: Good afternoon.

22 MS. MEHTA: Good afternoon, your Honor.

23 Sonal Mehta, Josh Lerner, Laura Miller,
24 Zach Abrahamson and Cat Kim on behalf of
25 Facebook. And with us is Natalie Nagle from
26 Facebook.

1 THE COURT: Good afternoon.

2 This matter was originally on for the
3 four motions to seal and also for case management
4 conference. My understanding now is that there
5 has been a writ filed with regard to my hearing
6 this case and it is pending, so as such, the
7 purpose of the hearing today is for this Court to
8 reschedule the motions to seal and another case
9 management conference.

10 My thinking is that the month of August
11 is not available and it may take some time for
12 the Court to make its decision. We should
13 probably look at September.

14 Mr. Lerner.

15 MR. LERNER: I understand, your Honor.
16 If it's possible we would like to briefly
17 addresses the effect of not doing anything prior
18 to another hearing. We think that your Honor,
19 obviously, has the power to keep things moving
20 and the fact that they filed a writ, particularly
21 given that the Court of Appeal has the ability to
22 stay the case should not, yet again, stop this
23 case.

24 Your orders, as you know better than I
25 do, have not been regarded here. And this is one
26 more instance of that. And for us there are

1 consequences to the endless delay. Just a day or
2 so ago more documents were released. So on our
3 side of the V there are real consequences to the
4 ongoing disregard for your Honor's orders. And
5 we would, therefore, ask to finally be able to
6 commence the discovery notwithstanding the writ.

7 THE COURT: All right. Thank you.

8 Mr. Fernandez.

9 MR. FERNANDEZ: Your Honor, we're here
10 to solve problems and the chief problem at the
11 moment is that we want to avoid a procedural
12 morass that would -- that would be very difficult
13 to unwind if we go down that road.

14 The prudent case management action today
15 would be as your Honor has suggested do nothing.
16 There will be nothing to unwind. And continue
17 the case management conference until the date in
18 September.

19 The due process and rights to a judge
20 under 170.6 are much more important in this
21 circumstance than any incidental effect of delay.
22 Delay itself is not prejudicial.

23 Thank you, your Honor.

24 MR. LERNER: I'll be brief. As I just
25 said there are consequences for us and what
26 you've heard from the plaintiffs on basically the

1 ongoing disregard of a number of orders is
2 'Please don't do anything because then we'll have
3 to unwind stuff.' That unwinding word is pretty
4 important on our side because we can't unwind the
5 ongoing release of documents. We can't unwind
6 the violation of your Honor's orders in the UK or
7 here. On our side, we can't unwind anything. So
8 the unwinding that it would need to occur on our
9 side is not hypothetical; it's real. And it
10 can't be undone.

11 And until we can find out, finally, the
12 scope of the violation, we're suffering harm and
13 it's actual harm that you can read about and see
14 and not hypothetical, which is all you've heard
15 for months now.

16 And as to the delay point, the cases say
17 in no uncertain terms that filing a 170.6
18 challenge for the purpose of delay is improper.
19 So whether they take a writ or not, our position
20 on the face of this is that this is improper
21 delay based on results that they don't like,
22 which the case law says isn't how we should do
23 it. And so we would very much ask to, finally,
24 be allowed to get to the bottom of why your
25 Honor's orders were disregarded and how we can
26 try and stem the consequences of that just a

1 little bit.

2 THE COURT: Well, there's, at least, one
3 problem with proceeding forward and that is that
4 several weeks ago I had ordered Mr. Kramer to
5 retain counsel for the express purpose of
6 representing Six4Three with regard to the
7 discovery issues.

8 I also indicated that it may be prudent
9 to retain a second set of counsel for the purpose
10 of any sanctions or to prepare for any contempt
11 citations that may be issued or, at least, filed
12 as requested by Facebook and the defendants.

13 Today Mr. Fernandez has appeared on
14 behalf of Six4Three, but I don't know what the
15 status of his appearance is other than what I
16 read in his papers, which is the representation
17 of Six4Three is limited in scope. The limited
18 scope is that, number one, representation will be
19 had only if there is a motion for sanctions or a
20 contempt citation, and we have neither here.
21 Nothing's been filed by Six4Three. That's the
22 basic problem.

23 Technically, Mr. Fernandez, your firm is
24 not appearing with regard to the CMC or the
25 motions to seal because your scope is limited as
26 to your representation.

1 MR. FERNANDEZ: Your Honor, the limited
2 scope notice does include the CMC.

3 THE COURT: Okay. All right. So
4 short --

5 MR. FERNANDEZ: Your Honor --

6 MS. MEHTA: Your Honor, I think the
7 concern, and I'm sorry for reacting so strongly,
8 but the concern that I have is every time there's
9 a question about what the scope of the
10 representation is the story changes. So first it
11 was just the motion for sanction; then in
12 subsequent filing it included some discovery.
13 Now it includes the CMC. It included the 170.6
14 challenge.

15 What they are doing is unilaterally
16 deciding what the scope of the representation is
17 to suit Six4Three's end goal which is delaying
18 these proceedings and simultaneously refusing to
19 have representation on the discovery that is
20 necessary to move this case forward. And what
21 you heard them say is, well, we need to be
22 careful about Six4Three's due process rights.
23 Certainly the Court should reasonably consider
24 the due process rights of Six4Three but not to
25 the hindrance of Facebook's rights.

26 And here what they are saying is we can

1 continue to play games with the Court's order
2 that Mr. Kramer get counsel, we can continue to
3 play games with what the scope of our
4 representation is, and when it's convenient, we
5 represent the client, but when it's not, we
6 don't. And meanwhile, Facebook cannot get any
7 information as to what was done with Facebook's
8 confidential information.

9 If the CMC is reset to September, we
10 will be ten months out from the time that this
11 was originally unveiled and we still won't know
12 who got our confidential information, what the
13 confidential information that leaked was, and
14 what's been done with it. Ten months.

15 And Mr. Fernandez cannot stand here and
16 say, well, now I'm here for the CMC and I'm here
17 for the 170.6 challenge, but I'm not here for
18 discovery. That is essentially rendering the
19 Court's authority to enforce its own orders null
20 and void by unilaterally continuing to play games
21 with respect to the representation of the client.

22 THE COURT: What I have here is the
23 Notice of Limited Scope Representation that was
24 filed on July 2nd. And mind you, I did not say
25 that the plaintiffs were unrepresented for other
26 matters without any basis and fact. All I can do

1 is rely upon and judicially notice the Notice of
2 Limited Scope of Representation.

3 It says at paragraph 2C that, quote, "We
4 will defend a motion for sanctions if brought by
5 the defendants as contemplated in their recent
6 case management conference statement and we will
7 appear at the case management conference set for
8 July 19th, 2019 if it goes forward." So
9 Mr. Fernandez is correct insofar as he said that
10 his representation includes the case management
11 conference. And I misspoke in that regard
12 because I did read this several days ago.

13 During the limited scope representation,
14 the principal for the corporation was indicated
15 in paragraph 4, but this is the only extent of
16 the representation. So we don't have the
17 corporation being represented with regard to any
18 of the other activities.

19 MS. MEHTA: So, your Honor, my point
20 was, and I agree with what you said about the CMC
21 statement, my point was that CMC statement
22 doesn't contemplate representation for the 170.6
23 or the writ that they've taken, the subsequent
24 filings in which they said that they were gonna
25 be engaged in some discovery.

26 Unfundamentally, the problem is your

1 Honor ordered Mr. Kramer to get counsel for the
2 company so that these proceedings and the Court's
3 investigation could go forward. Rather than do
4 that, they have engaged counsel for this limited
5 scope the net of which is only to delay the
6 proceedings by another two months. That itself
7 continues to infringe on Facebook's rights to get
8 to bottom of what happened here. And your Honor,
9 respectfully, the Court's right to investigate
10 the violation of multiple court orders that
11 continues to this day. They cannot continue to
12 engage in selective representation or the
13 selective engagement of counsel for selective
14 representation for the purpose of delaying the
15 case while refusing to engage counsel to actually
16 represent them on the substance of the inquiry
17 into the violation of the Court's orders.

18 THE COURT: Do you have a belief or
19 theory as to whether this delay is intentional?

20 MS. MEHTA: I, obviously, can't get into
21 Mr. Kramer's head, but, your Honor, if we look at
22 the facts, it is hard to believe that this is not
23 intentional and the reason I say that -- and
24 again I'm not in Mr. Kramer's head, but the
25 reason I say that is they have been on notice of
26 the need to get new counsel since November. When

1 they have been called out on the efforts that
2 they have taken to get new counsel, the
3 submissions that they have made have been
4 completely unsatisfying. The first submission
5 listed a handful of firms or a little more than a
6 handful of firms that Mr. Kramer said that he'd
7 contacted. Those firms were facially gonna have
8 conflicts with Facebook.

9 There were firms -- if you Google
10 Facebook and Fenwick and West, it will be clear
11 that Fenwick and West represents Facebook and yet
12 that's one of the firms he contacted. There were
13 other firms that he said declined representation
14 because they were adversed to Facebook, which
15 makes no sense as a conflicts matter.

16 Subsequent statements where, well, we
17 contacted one firm and they needed three months
18 to look at the records to even know what the
19 scope of the representation was. The last we
20 heard was we went to a law firm and they said
21 they didn't know what the scope of the
22 representation was so they couldn't take us on.

23 It's been excuse after excuse after
24 excuse. All of which are completely unsatisfying
25 and none of which actually would demonstrate a
26 good faith effort on Mr. Kramer's part to go and

1 secure counsel. And you have given Mr. Kramer
2 opportunity after opportunity after opportunity
3 since November to either get counsel or make a
4 showing as to what he's really done to get
5 counsel and why he can't do that. And nothing he
6 has said makes any sense or holds together. So I
7 don't want to cast aspersion on someone's
8 intentions without being inside their head, but
9 if I look at these facts, it's pretty hard to
10 believe that on that record this individual is
11 making a good faith effort to actually get new
12 counsel especially when you finally ordered him
13 after months to get new counsel. What he did was
14 engaged new counsel for the sole purpose of
15 initiating a 170.6 delay -- 170.6 challenge and
16 then requesting a multi-month delay of the case.

17 THE COURT: Let me just read one more
18 provision of paragraph 2C of the Notice of
19 Limited Scope Representation that was filed on
20 July 2nd, 2019. The last sentence -- and I
21 failed to read it into the record previously --
22 is as follows -- actually, there are two
23 sentences. Quote: "This engagement is strictly
24 limited." Period. "If we agree to perform any
25 other or further work," comma, "this notice will
26 be amended." Period. Closed quote.

1 So essentially Six4Three is
2 unrepresented with regard to the discovery issues
3 on why the information was leaked or disclosed in
4 violation of the protective orders that have been
5 issued or subsequent restraining orders that I've
6 issued in this case in 2018 and any orders that
7 were relevant in 2019.

8 MR. FERNANDEZ: Your Honor, I believe we
9 do represent Six4Three with respect to any
10 potential motion or any proceedings arising from
11 that.

12 THE COURT: That's not what this says.
13 It says, "We will defend a motion for sanctions
14 if brought by the defendant as contemplated in
15 their recent case management conference
16 statement. And we will appear at the case
17 management conference." It says, "This
18 engagement is strictly limited." Period.

19 I don't think I need to reiterate the
20 last sentence. So everyone is trying to
21 determine exactly what the scope of your
22 representation is so that we can move forward
23 with the case. Right now we can't. I certainly
24 didn't issue any tentative rulings with regard to
25 the motions to seal because there was no
26 representations of Six4Three with regard to the

1 substantive motions pending.

2 MR. FERNANDEZ: Your Honor, the
3 procedure for handling the discovery issues would
4 be a motion to sanction, but it's not pending.
5 We are representing Six4Three at this hearing.
6 That's what the Notice of Limited Engagement
7 says. I don't think your Honor is commenting
8 that any of that is improper; only that in the
9 context of that we can't really move forward.
10 Also in the context of what your Honor said at
11 the outset of the hearing, the pending writ and
12 the question of whether any orders entered by
13 your Honor will be deemed void or not. We want
14 to avoid problems. I think your Honor's initial
15 suggestion is the best one, the one that avoids
16 the most problems.

17 THE COURT: You still didn't answer the
18 question as to the scope of the representation.
19 There's a motion -- the motion for sanctions is
20 not pending.

21 MR. FERNANDEZ: Uh-huh.

22 THE COURT: There is a motion to reopen
23 discovery and the discovery was to be open and
24 conducted if the corporation Six4Three was
25 represented by counsel. And unfortunately, for
26 the general purposes of representing the

1 corporation that has not been done.

2 MR. FERNANDEZ: Your Honor --

3 THE COURT: There's no pending motion
4 for sanctions.

5 MR. FERNANDEZ: Your Honor, I think this
6 is a little bit of a distraction and a red
7 herring. If we had appeared today under a full
8 scope appearance, we would still have the same
9 concerns about our 170.6 challenge. Had we
10 appeared under a full scope and brought our 170.6
11 challenge, we'd still have the same procedural
12 problems we're facing.

13 THE COURT: Except the difference is I
14 directed your client to obtain counsel to
15 generally represent the corporation so that we
16 could move forward.

17 MR. FERNANDEZ: And, your Honor, we
18 don't concede that we're in violation of that
19 order. The point is that your Honor doesn't have
20 the authority at the moment to enter any further
21 order.

22 THE COURT: Mr. Lerner?

23 MR. LERNER: Two things: First, the
24 suggestion that there is one vehicle for getting
25 a discovery that has a motion is false and again
26 ignores your Honor's orders. We have set up from

1 the very beginning the logical sequence that your
2 Honor enforced not once but on two different
3 occasions, which is the way we litigate in this
4 state, which is discovery that would inform the
5 motions. And indeed, your Honor took the time, a
6 lot of time, to review discovery requests, to
7 review document requests, which your Honor
8 actually carefully considered and thought about
9 and considered which ones would work and which
10 ones wouldn't, the protocol for reviewing
11 documents, which your Honor took the time to
12 review, and the sequence, as we've said before,
13 in which they continually ignore was discovery
14 followed by the motions. So it's not that they
15 get to forego any discovery into the wrongdoing
16 and just have a motion without our learning
17 anything. That's false.

18 The next piece that's incorrect, as a
19 matter of law, is that your Honor can't do
20 anything right now. They filed a writ and
21 they've asked the Court of Appeal for a stay.
22 The Court of Appeal will or will not agree. To
23 very briefly touch relatedly on your question
24 about whether or not this is for the purposes of
25 delay; if they are right about their argument,
26 then gamesmanship of this nature is permissible

1 and we have found no case nor has any case ever
2 been submitted to your Honor that somebody
3 could -- to use blunt terms -- get rid of a judge
4 after a lot of rulings just because they hired
5 new counsel.

6 THE COURT: All right.

7 MR. LERNER: So we're not aware of
8 anything that prevents you from allowing us to
9 finally move forward.

10 THE COURT: I'd like to have my bailiff
11 approach and hand this document to Mr. Fernandez,
12 if you would please. The record shall reflect
13 that I'm handing the limited scope notice of
14 representation to my bailiff which in turn of
15 giving it to Mr. Fernandez.

16 Mr. Fernandez, I'm reading your Limited
17 Scope Representation document that you filed.
18 That's all I have to go by. And it's
19 inconsistent with representations that you made
20 today. It's very limited.

21 MR. FERNANDEZ: Your Honor, we could, of
22 course, agree to handle any additional work, we
23 would then go and amend the Notice of Limited
24 Scope Representation. I don't think the process
25 of limited scope representation was designed to
26 be restrictive but to enable participants, more

1 participants than would, to participate in
2 litigation notwithstanding financial constraints.

3 THE COURT: I'm still somewhat in the
4 dark. I understand what the scope is. There
5 were other matters that are pending and there was
6 a discovery request, so certainly the motions to
7 seal there's no participation with regard to
8 that. That has nothing to do with sanctions. So
9 I believe that we're going to have to continue
10 this matter, nonetheless, based on motions to
11 seal because counsel is not representing
12 plaintiff on those matters. And I see no papers
13 filed on their behalf in any event.

14 The one thing that we can do is to
15 continue the CMC out for one week. Perhaps,
16 August 1st. I don't ordinarily handle complex
17 matters on Thursday, but I can in this instance.

18 MS. MEHTA: We appreciate that, your
19 Honor, we will be here whenever you can see us
20 because we want to move this forward, so August
21 1st it is.

22 MR. FERNANDEZ: Your Honor, I have a
23 point of personal privilege, I'm going on a
24 family vacation through August 2nd, but I'll be
25 back.

26 THE COURT: Then we are going to be in

1 the middle of a trial starting on August 5th.

2 MS. MEHTA: Your Honor, could we do this
3 with Mr. Fernandez -- I hate to impose on a
4 vacation, but on the other hand, for the reasons
5 I've already gotten into quite vocally, time is
6 of the essence and continued delay is
7 prejudicial. Is there a way we could do this
8 with Mr. Fernandez appearing by phone on August
9 1st or before he goes on vacation?

10 THE COURT: Just one moment.

11 (pause)

12 THE COURT: I've spoken with my clerk
13 about the last day in July looks like we have
14 2:00 in the afternoon on July 31st.

15 MR. FERNANDEZ: Your Honor, if we're
16 trying to avoid my vacation, my vacation starts
17 this afternoon and runs through August 2nd.

18 MS. MEHTA: Again, your Honor, and I'm
19 generally very sensitive to people's family
20 obligations, given that you have a trial the
21 following Monday, that really puts us in a bind
22 and basically guarantees then we'll have another
23 month of delay, so I would ask if Mr. Fernandez
24 would be willing to join by telephone given these
25 circumstances.

26 MR. FERNANDEZ: I very much rather not,

1 your Honor.

2 MR. LERNER: One thing that may help
3 with respect to these dates, your Honor pointed
4 about what we can do, doesn't seem like there's
5 an incentive to pay any attention to your request
6 for full representation. If it's not going to be
7 Mr. Fernandez and he's not going to take on the
8 full representation. You've already asked them,
9 not asked, ordered Six4Three to have counsel
10 that's fair to everybody in the case and to the
11 Court once. If they don't have it in another
12 week, monetary sanctions will provide an
13 incentive to get that done. And putting aside
14 Mr. Fernandez's vacation, counsel who can handle
15 the case in the way the Court ordered, a long
16 time ago now, can make an appearance before the
17 end of the month. That shouldn't be hard.
18 Complying with the Court's orders should not be
19 this hard.

20 MR. FERNANDEZ: Your Honor, the more
21 likely scenario is we'll simply expand the scope
22 of our representation by filing an amended notice
23 to include the motions to seal and any pending
24 discovery issues.

25 MR. LERNER: And if I showed up, your
26 Honor, on behalf Facebook after you ordered

1 Facebook to be represented and I behaved the way
2 Plaintiffs are behaving here, I cannot imagine
3 that the result would be mere extension so that I
4 could just change my tune. We are getting gamed
5 here and as are you. The Court issued very clear
6 orders. We shouldn't have to wait, again, now
7 for another month while counsel is on vacation
8 even though counsel is not engaged in a full
9 scope representation but is now saying he might
10 later.

11 THE COURT: All right. For the next
12 three weeks in August we have the 5th through, at
13 least, the 21st, the Court has a jury trial. I
14 don't know when the trial is going to conclude.
15 I assume the 21st, it may go longer. And I also
16 have a dark day to prepare for some other
17 hearings on some complex matters.

18 The only thing that I can do is to set
19 aside some time in the morning and reconvene my
20 jury trial at a later time in the morning or
21 early until afternoon. That's all I can do. I
22 have no other time.

23 MS. MEHTA: We really appreciate that,
24 your Honor, and we will take whatever time you
25 can give us and we'll be here as early in the
26 morning as you want us here.

1 THE COURT: All right. If Counsel are
2 alerted ahead of time, they can plan accordingly
3 with witnesses or how they wish to proceed in the
4 trial.

5 My trial starts on August 5th, jury
6 selection is probably in the afternoon, depending
7 upon how many motions in limine there are, and I
8 haven't received any yet. The Court usually
9 takes some time to read these motions and so we
10 probably wouldn't be in session in any event.
11 That's one thing that we could do.

12 Or I could start on the 7th at 9:00 in
13 the morning with your motions or with the hearing
14 on the CMC, I should say, and convene at 10:00.
15 The 7th is really a date to determine the
16 representation of the plaintiff corporation and
17 reset it any time for the CMC -- for the motions
18 to seal. We will not be arguing the motion to
19 seal obviously on the 7th.

20 We're gonna be in the midst of jury
21 selection as my courtroom clerk has reminded me
22 and I'm aware of that on this other case, but we
23 may have to just ask the jury pool to come back
24 at a later time in the morning or early
25 afternoon. That's all that we can do. So I'll
26 set this matter for a case management conference

1 to August 7th, 2019 at 9:00 a.m. Counsel had
2 better be prepared to indicate representation on
3 that date and that will be the new CMC date. And
4 provided that there is full representation, the
5 discovery will go forward from that day. All
6 right?

7 MR. FERNANDEZ: Thank you, your Honor.

8 THE COURT: Yes, Mr. Murphy?

9 MR. MURPHY: Did I hear you say that the
10 motion for discovery to reopen discovery will be
11 heard that date, so I assume that the stay
12 ordered previously issued from the Court will
13 remain in place until that time?

14 THE COURT: Well, it should because
15 there's no representation.

16 MR. MURPHY: Correct. Thank you, your
17 Honor.

18 MR. LERNER: And we, again, would just
19 ask, given the history of disregarding your
20 Honor's order on this point, if there is not full
21 representation so that after ten months we can
22 finally get some information, we think monetary
23 sanctions are more than in order.

24 MR. RUSSO: Your Honor, we think there's
25 been full compliance. Obviously, licensed
26 counsel read your order. He believed there was

1 full compliance. We believe there's been full
2 compliance. The fact that they chose, based on
3 the budget they had available, to use a limited
4 representation approach was not to disregard you
5 or to disregard Facebook. Counsel is here. I
6 don't think he's showing any intent to do
7 anything obstructionist. He's actually
8 suggesting what you started with which is there's
9 an orderly process. We've been saying that for
10 awhile.

11 We've been saying if Facebook believes
12 there's been a violation of protective order,
13 which clearly they do, we disagree, we think
14 there was Section 16 compliance. As you know,
15 we've had this discussion before. The right
16 process is in re []Kowler where they bring the
17 contempt charge and then they would say we're
18 gonna ask for criminal contempt, we're gonna ask
19 for civil contempt, or we're gonna ask for
20 something else: Dismissal, sanctions. Whatever
21 it is. This whole notion of 'Let's do a bunch of
22 discovery because we really don't know what
23 happened here,' but on the other hand, they were
24 vociferously saying there's been violations of
25 your orders, right, left and sideways. There's
26 been an ultimate inconsistency there.

1 Reading in re Kowler, as I'm sure you
2 have, we may differ about our respective
3 readings, but it's really time for them to make a
4 choice. And then if counsel says "I'm not a
5 criminal defense lawyer. I'm not someone that's
6 gonna do that criminal case. That's gonna be
7 done by someone else in my firm or someone else
8 at a different firm." That's, perhaps, why this
9 limited scope was engaged in. I don't know what
10 those discussions were. I wasn't privy to them,
11 but I can tell you Mr. Kramer is a lay person.
12 He's not a lawyer. He relies on advice. He
13 received that advice from a licensed attorney;
14 that attorney is here. He's responding to you.

15 I would simply suggest somewhere in this
16 it's time for Facebook to kind of put up and stop
17 the nagging about how they're supposedly people
18 like my clients who don't have anything, they've
19 not sent anything to anyone. There's reporters
20 in the audience, we know that. They've been here
21 multiple times for multiple different newspapers.

22 The fact that they have access to
23 documents is because what happened in London last
24 year has resulted in no action by Facebook in
25 London. That's where the source of this
26 information is. They got to do something there.

1 That's a different country with a different legal
2 system.

3 THE COURT: All right. Mr. Russo, I
4 understand everyone's inclination to talk about
5 the substance or the merits. This is not what
6 this is about. The Court has made some
7 observations based upon my living with this case
8 for 18 months as to what happened and what was
9 reported. There is a for-your-eyes-only
10 provision in the protective order that is to say
11 for the attorney's eyes only and the Court had
12 inquired as to your client as to how he got the
13 documents, why he had the documents, if it was
14 for the attorney's eyes only, and why the
15 documents were transported to London. These are
16 questions that have already been asked. I'm just
17 reiterating them for the record. And then how
18 they were exposed. The Court had the opportunity
19 to review the demand letters by the DCMS and so
20 forth. So those matters are important issues
21 that need to be resolved by virtue of the next
22 CMC and a hearing on sanctions or contempt and
23 the discovery that needs to be done in relation
24 to that.

25 My only purpose today as much as it was
26 a limited scope on the part of Mr. Fernandez's

1 firm was to set another CMC, and I have set that
2 date, August 7th at 9:00 a.m. Everyone's on
3 notice as to what they need to do and so we'll
4 see everyone on August 7th.

5 And who will prepare the order in this
6 regard?

7 MS. MEHTA: Your Honor, we're happy to
8 prepare the order.

9 THE COURT: All right. So the CMC is
10 continued to August 7th, 2019 at 9:00 a.m. for
11 the determination of representation and the
12 opening of discovery. All right?

13 MR. RUSSO: Your Honor, can I make a
14 suggestion because I could see what is about to
15 occur based on what I've heard Facebook -- two
16 different counsel from Facebook say repeatedly
17 that Six4Three has to get a lawyer, perhaps
18 Mr. Fernandez, perhaps his firm, for, quote,
19 "full representation," whatever that means in the
20 context, where we know they've not made a choice
21 about whether it's gonna be criminal contempt,
22 civil contempt or something else. They just want
23 discovery.

24 In fairness to everyone, including what
25 I report to folks about what's supposed to
26 happen, are they supposed to find the lawyer if

1 Mr. Fernandez says look, "I can't just swallow a
2 whale here. This is too big, too many moving
3 parts, I can't do it." I forecast this quite
4 awhile ago when they said it's time that Facebook
5 to follow in re Kowler. And what the reply was
6 "Now we can take discovery. We're a big company.
7 We get to take up positions all over the place.
8 We can review documents." I think fundamentally
9 that's flawed. It's not consistent with our
10 District Court of Appeal has said in that case.
11 So let's just anticipate the obvious. They're
12 gonna propose an order that says full
13 representations require, whatever that means. I
14 think there's gonna be a problem with that when
15 you get forward to that August date and, perhaps,
16 Mr. Fernandez says "I can't swallow that size
17 fish at this point." I'm just anticipating it --

18 THE COURT: Right.

19 MR. RUSSO: -- to be helpful.

20 THE COURT: No, I understand, Mr. Russo,
21 and duly-noted. I think that I did say many
22 weeks ago that there needed to be counsel to
23 represent the plaintiff on two bases. One, the
24 corporation with regard to any discovery that
25 would be propounded; and second, as to any
26 contempt or sanctions that will be pursued by

1 Facebook against your client. Your client's
2 company, okay? I can do no more than that. I
3 identified what the needs were, which is probably
4 more than I should have, but as a practical
5 matter that's what happens in contempt cases or
6 sanctions cases. You may have more than one
7 representation. I believe, Mr. Russo, you agree
8 with me at the last hearing that we had on that
9 subject.

10 MR. RUSSO: I agreed that your
11 observations were great, but they didn't help the
12 actual function of Facebook making the choice it
13 has to make. They're not making that choice,
14 your Honor.

15 THE COURT: Right. And I'm presiding
16 over this matter. I'm not making the choices as
17 to litigation strategies.

18 MR. RUSSO: But you can say to them,
19 your Honor, in fairness, in re []Kowler says make
20 a choice. Is it criminal? Is it civil? Is it
21 something else? That's only fair because I don't
22 think that Mr. Fernandez and his firm is a
23 criminal defense firm. I did that many decades
24 ago, I don't do that anymore, so I'm not gonna be
25 the criminal defense lawyer here.

26 THE COURT: Although you could.

1 MR. RUSSO: I could, but believe me I
2 have enough loss of hair at this point.

3 THE COURT: All right. I will say that
4 that opportunity was afforded and I think
5 Facebook's counsel did admit the last time as to
6 why they hadn't gone forward with a contempt
7 citation. I think they were prepared to do so.

8 MS. MEHTA: Your Honor, we raised the
9 issue and I'm happy to go over it again, which is
10 what Mr. Russo has suggested and continues to
11 suggest, it's just even know when it's not really
12 relevant to the matter at hand, is that Facebook
13 should be forced to elect a remedy before it even
14 knows the scope, the extent and the actors in the
15 underlying harm. It completely flips on its head
16 these legal proceedings. We should not have to
17 elect what the remedy is whether it's civil
18 contempt or criminal contempt or sanctions and in
19 what form until we and the Court have an
20 opportunity to get to the bottom of who did what
21 and when, what documents were leaked, how did
22 Mr. Kramer get the documents, how did Mr. Kramer
23 end up in London with them, what about all these
24 e-mails that were sent?

25 Your Honor went through a crime fraud
26 ruling with just the tip of the iceberg on

1 discovery and laid out all what we know now and
2 all of the questions that were raised by that.
3 There's nothing in []Kowler that says nor in any
4 case that they have cited nor would it make any
5 sense for there to be a rule that we should have
6 to elect before we go forward with discovery what
7 our remedies are.

8 THE COURT: I will say that there has to
9 be someone there during the course of discovery
10 that's gonna be able to raise or protect the
11 Constitutional rights of the individuals being
12 deposed, which may require someone with the
13 expertise of a criminal defense attorney rather
14 than a civil attorney. Although, a civil
15 attorney may, in fact, issue spot to see that
16 there needs to be a constitutional protection
17 under the Fifth Amendment and so forth, but,
18 nevertheless, Mr. Russo brings up a valid point
19 with regard to representation based upon the kind
20 of charges or sanctions being pursued or type of
21 contempt that's being sought in certain types of
22 cases that I presided over. And I've done
23 several contempt citations in family law. Many.

24 There's an OSC re contempt that's filed
25 and there are certain charges that are listed,
26 there are counts as to what the violations have

1 been, and then those counts are proven in a
2 hearing. In this case you would have some
3 discovery based upon the motion or citation which
4 you file.

5 MR. RUSSO: After the filing, your
6 Honor.

7 THE COURT: Yes.

8 MR. RUSSO: []Kowler says after the
9 filing.

10 THE COURT: That's right.

11 MR. RUSSO: The suggestions that it
12 occurs only after they bleached the world with
13 what it is that has happened or hasn't happened
14 and where and why and how, that's not fair.
15 That's not fair to, even fundamentally, whoever
16 is the lawyer that's gonna handle the Six4Three
17 side of things. It's not fair to whoever comes
18 in this case. It's also not fair to Mr. Murphy's
19 client because he's sitting there waiting for,
20 'Geez, do I have some responsibility here?' And
21 look, if they're gonna charge, let them charge.
22 Let them do the charge. They might discover that
23 there's only a very narrow area of disagreement
24 under Section 16 that has to be resolved. It
25 doesn't require a (unintelligible) or a discovery
26 process. It doesn't require discovery process at

1 all. It requires simply for them to say we are
2 going -- for example, 'We're gonna go for civil
3 contempt and just against Six4Three. What's your
4 position on that?'

5 THE COURT: Well...

6 MR. RUSSO: That may be far away to
7 simplify this thing in a radical way.

8 THE COURT: I do believe at this point
9 there needs to be something filed so that
10 discovery can be done based upon whatever is
11 filed. And if there needs to be an amendment,
12 that that's done but I think -- I'm presiding
13 over this matter. I can only make observations.
14 I'm not doing anything beyond my responsibility
15 as a judicial officer and you're pushing the
16 limits with regard to what we can do to move this
17 forward. All I can do is set hearings and CMCs
18 and rule accordingly.

19 MS. MEHTA: Your Honor, point taken and
20 we will work on that. The problem that I have
21 with what Mr. Russo is suggesting is Mr. Russo
22 doesn't represent the company and here he is
23 arguing for the last ten minutes about all the
24 things that we should have to do in terms of
25 electing our remedies before the discovery can go
26 forward.

1 THE COURT: That's something that should
2 be coming from Mr. Fernandez, not from Mr. Russo.

3 MS. MEHTA: Precisely.

4 MR. FERNANDEZ: And your Honor --

5 THE COURT: But -- yes?

6 MR. FERNANDEZ: -- and those are the
7 arguments I would make, election of remedies
8 doesn't come in to it. You have to have -- as in
9 the complaint you have to have a cause of action
10 to limit the scope of discovery so that the
11 defendant knows what to respond to and how.
12 Without the allegation there's no limit.

13 MS. MEHTA: No, your Honor. That's not
14 true. Your Honor has the authority to enforce
15 his own court orders and to explore and permit
16 discovery to understand the scope of the breach
17 of the court orders. We may also seek remedies
18 such as sanctions, monetary sanctions,
19 terminating sanctions. We may potentially pursue
20 contempt proceedings, but fundamentally, your
21 Honor has the authority to enforce his own
22 orders. We do not have to have some separate
23 cause of action in order to do that.

24 THE COURT: All right. This sounds
25 right for briefing, so on August 7th you're going
26 to have some briefs filed with regard to the

1 scope of the Court's responsibilities and what
2 the defendant is advancing or the defendants are
3 advancing.

4 MS. MEHTA: Your Honor, may I request
5 the opportunity for us to actually file a brief
6 before that so that they can respond properly
7 upon August 7th. What I don't want is to file a
8 brief on August 7th and then have them respond
9 two weeks later.

10 THE COURT: The hearing is gonna be on
11 August 7th.

12 MS. MEHTA: Okay. Thank you.

13 THE COURT: The briefing schedule that
14 I'm going to set forth. So given that this is
15 your motion, I'm gonna order that you file your
16 brief and serve electronically and also
17 personally hand-delivered no later than July 24th
18 at 5:00 p.m. No later than at the close of
19 business.

20 Any responsive or opposition papers
21 should be filed no later than close of business
22 electronically and hand served on July 31st.

23 MR. RUSSO: Your Honor, may I make a
24 request because there's a suggestion about
25 Six4Three and who's speaking for who?

26 THE COURT: I'm still speaking here and

1 then I'll hear from you, Mr. Russo.

2 MR. RUSSO: Sure.

3 THE COURT: Any reply should be filed no
4 later than August 2nd to give the Court time to
5 be able to review it. Okay?

6 MR. RUSSO: Your Honor --

7 THE COURT: Served electronically and
8 hand-delivered.

9 The Court also wants the parties to
10 abide by the case management conference orders,
11 but I also want hand-delivered hard copies,
12 courtesy copies to this Court on the days that
13 they are to be filed.

14 Mr. Russo, yes, sir?

15 MR. RUSSO: Your Honor, along the lines
16 of radical simplification, if they were to say,
17 Look, initially, we're only gonna seek, without
18 prejudice to our position, remedies as against
19 Six4Three, not against the individuals, not
20 against the lawyers, not against the lawyers for
21 the lawyers, not against whatever the troop of
22 other people they want to drag into it; that
23 would radically simplify what you have to do.

24 If they say, which I anticipate, we want
25 to go throughout the world and figure out whether
26 we could get some people in the UK to have to be

1 charged with contempt and we want to bring in the
2 entire parliament because we think they violated
3 our rights, that's a different ginormous case. I
4 think it's up to them to make a decision, at a
5 minimum, to say, Look, Russo, you don't have to
6 appear anymore, we're never gonna target your
7 client until we get a determination as against
8 Six4Three. Because the reality is that they
9 can't win against Six4Three; they can't win
10 against the individuals; they can't win against
11 the lawyers. That's the conundrum here. They're
12 playing the circular play of 'We'll just keep
13 ratching this thing until finally people just run
14 out of money. That's the reality.

15 THE COURT: Right. The elephant in the
16 room is a set of orders that this Court has
17 issued, and the fact that notwithstanding these
18 orders were in place, all this confidential
19 information was released. That's it.

20 MR. RUSSO: But not without a subpoena
21 issued by a committee from Parliament, your
22 Honor. That's being left out of the story.

23 THE COURT: Right. Well, but there's
24 one more factor and that is how that information
25 got there so that the principal from your
26 corporation, actually your client as principal of

1 Six4Three came into possession of that
2 information and why he was in London and then
3 turned it over. That's the question.

4 MR. RUSSO: And the declarations answer
5 that, your Honor. They don't like the answer,
6 but they answered that.

7 THE COURT: I'm not passing judgment.
8 All I'm doing is recounting the information and
9 the facts as they were received by the Court and
10 based upon the papers filed by the parties. All
11 right.

12 So why don't we adhere to that briefing
13 schedule and everyone knows what they need to do.

14 Mr. Murphy, did you have something, sir?

15 MR. MURPHY: Just not for the subject of
16 argument but just an alert for everyone.

17 THE COURT: Yes.

18 MR. MURPHY: As the Court remembers, we
19 saw an ex parte application for a hearing date on
20 the motion for reconsideration that the crime
21 fraud exception and the Court said that it was
22 moot because of the stay order in place. I just
23 want to alert everyone because I've heard these
24 allegations that somehow made that my clients
25 have tried to unnecessarily delay this case,
26 which is not true. We will be filing a motion

1 for reconsideration as soon as the stay order is
2 lifted.

3 MR. LERNER: So just to be clear, not a
4 writ?

5 MR. MURPHY: Pardon me?

6 MR. LERNER: You're not gonna be filing
7 a writ?

8 MR. MURPHY: The first step is the step
9 by the city.

10 MR. LERNER: So not a writ?

11 MR. MURPHY: It's a motion for
12 reconsideration.

13 MR. LERNER: Thank you.

14 MR. MURPHY: That's the first step.
15 Thank you, your Honor.

16 THE COURT: Thank you very much,
17 Mr. Murphy.

18 All right. So anything further?

19 MR. FERNANDEZ: No, your Honor.

20 MS. MEHTA: No, your Honor.

21 THE COURT: Thank you very much,
22 everyone.

23 MS. MEHTA: Thank you, your Honor.

24 MR. MURPHY: Have a nice weekend, your
25 Honor.

26 MR. RUSSO: Thank you, your Honor.

1 THE COURT: Take care.

2 MR. MURPHY: Thank you.

3

4 (ADJOURNMENT)

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EXHIBIT 8

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
ZACHARY G. F. ABRAHAMSON (SBN 310951)
zabrahamson@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23**

**DEFENDANTS' CASE MANAGEMENT
STATEMENT**

Date: March 8, 2019
Time: 9:00 a.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

1 Defendants Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin,
2 Michael Vernal, and Ilya Sukhar (collectively “Defendants”) submit the following Case Management
3 Statement in advance of the Case Management Conference set for March 8, 2019.

4 **I. CASE STATUS**

5 On November 21, 2018, Theodore Kramer, CEO and founder of Plaintiff Six4Three, LLC
6 (“Six4Three”) violated this Court’s protective order; the Court’s sealing order of November 1, 2018; and
7 the Court’s order of November 20, 2018 that Six4Three should not disclose any Facebook documents by
8 disclosing Confidential and Highly Confidential information to the Digital, Culture, Media, and Sport
9 (“DCMS”) Committee of the United Kingdom.

10 In December 2018, the DCMS Committee published several of the documents that Six4Three and
11 Mr. Kramer had disclosed to it, including documents that were designated as Confidential or Highly
12 Confidential under the protective order. On February 15, 2019, the day before the President’s Day long
13 weekend, Mr. Collins tweeted that the DCMS Committee would be releasing additional documents from
14 Six4Three and Mr. Kramer’s disclosure. (The Court will recall that Mr. Kramer had contacted Mr. Collins
15 last fall and invited him to order Mr. Kramer to produce the Facebook documents that Six4Three had
16 received in litigation.) On February 16, 2019, a Saturday, Mr. Godkin notified Facebook’s counsel that
17 “Damien Collins has announced on Twitter his intention to release additional Facebook documents,” and
18 passed the responsibility for preventing this further release of documents onto Facebook, even though it
19 was his client that had disclosed the documents and initiated the relationship with the DCMS Committee
20 in the first place. Because Six4Three and its legal team were responsible for the disclosure to the DCMS
21 Committee, Facebook’s counsel asked Mr. Godkin multiple times to “identify any steps taken by
22 Six4Three, [him], or the Six4Three legal team since November 19, 2018 to prevent disclosure or release
23 of the documents by DCMS, including steps that Six4Three, [he], or the Six4Three legal team have taken
24 to prevent the release referenced in the email below.” Mr. Godkin refused to do so, despite the fact that
25 Mr. Kramer had previously said, in an apparent attempt to gain sympathy from the Court, that he had
26 engaged an international law firm in Washington, D.C., to “undertake whatever efforts it can under British
27 law to either obtain the documents that were provided . . . or to . . . secure agreement that they will not be
28 released[.]” See Nov. 30, 2018 Hrg. Tr. at 57:2-7. The DCMS Committee subsequently published yet

1 more documents that Six4Three and Mr. Kramer had disclosed to it, all of which were designated as
2 Confidential under the protective order.¹ All of these documents were published online in their entirety.
3 *Id.* The DCMS Committee also released its final report on “Disinformation and ‘fake news,’” which relied
4 heavily on the Confidential and Highly Confidential documents that Six4Three and Mr. Kramer disclosed
5 to the DCMS Committee, and quoted and described those documents.² The report notes several times that
6 the documents were sealed in this Court, showing a complete disregard for the integrity of this judicial
7 system and the sanctity of its orders.³

8 At the same time, Six4Three was apparently readying a misleading and libelous fundraising plea,
9 which Six4Three published on February 19, 2019. The plea, posted to the publishing platform Medium
10 and linking users to a fundraising page at GoFundMe.com, falsely accused Facebook of intentionally
11 violating user privacy and engaging in “mafia-like tactics.” *How Facebook Sold Your Data and Fooled*
12 *Government Regulators (Until Now)* (Feb. 19, 2019), available at [https://medium.com/@six4three/how-](https://medium.com/@six4three/how-facebook-sold-your-data-and-fooled-government-regulators-until-now-b8b3d41fb565)
13 [facebook-sold-your-data-and-fooled-government-regulators-until-now-b8b3d41fb565](https://medium.com/@six4three/how-facebook-sold-your-data-and-fooled-government-regulators-until-now-b8b3d41fb565). The plea falsely
14 claims that, “[o]nce a company relied on [Facebook’s] APIs based on Facebook’s promises, Facebook then
15 effectively put a gun to its head and forced it to deliver data or money for ads.” *Id.* Six4Three then leveled
16 baseless accusations against Facebook regarding its litigation conduct: “They have put our families through
17 immense distress. We’ve been tracked, followed, intimidated, [and] harassed[.]” *Id.* Six4Three should not
18 be permitted to continue to avoid any scrutiny by this Court (and Facebook) as to its admitted misconduct
19 and violation of Court orders, while attempting to cloak its false, inflammatory public accusations as
20 somehow legitimate because Facebook produced discovery (which does not in fact support those
21 accusations) as part of the litigation process.

22 To this day, Six4Three and its legal team, including Thomas Scaramellino, Birnbaum & Godkin,
23 LLP (“Birnbaum & Godkin”), and Gross & Klein LLP (“Gross & Klein”) have not provided Facebook the
24

25 ¹ *Further selected documents ordered from Six4Three*, available at
26 [https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Further-selected-](https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Further-selected-documents-ordered-from-Six4Three-Feb19.pdf)
27 [documents-ordered-from-Six4Three-Feb19.pdf](https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Further-selected-documents-ordered-from-Six4Three-Feb19.pdf)

28 ² *Disinformation and 'fake news': Final Report* (Feb. 18, 2019), available at
<https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1791/179102.htm>

³ See, e.g., *id.* at 5, 20, 26, 27, 40.

information necessary for Facebook and the Court to understand the scope of Six4Three and its legal team's violations of the Court's orders and to remediate those violations. They have not even identified all entities to whom they disclosed Facebook's Confidential and Highly Confidential information, and so Facebook still does not know who has its Confidential and Highly Confidential information and what they intend to do with it. For instance, Facebook does not know if the DCMS Committee has now published all of the documents Six4Three and Mr. Kramer disclosed to it, or if it intends to publish additional documents containing Facebook's Confidential and Highly Confidential information in the future. Instead of cooperating with Facebook, Six4Three and its legal team have repeatedly obstructed Facebook's limited requests for discovery and repeatedly delayed the hearing on Facebook's motion to open limited discovery into Six4Three and its legal team's breaches of this Court's orders. Facebook's motion to open limited discovery was originally set for hearing on February 7, 2019, but has been delayed for more than a month. The hearing on that motion should proceed as planned on March 15, 2019. But if Six4Three requests a further continuance, then Facebook requests that the hearing occur at the Court's earliest convenience and no later than April 9, 2019.

As another example, Facebook—with the Court's leave—originally served deposition notices on shortened time on these issues on November 30, 2018. But Facebook still has not been able to depose any witness regarding the multiple violations of the Court's orders. Facebook thus respectfully requests that the Court promptly resolve the motions to withdraw and then set a schedule for limited discovery and a briefing schedule for motions for terminating sanctions and contempt as set forth in Section III.

II. PENDING MOTIONS

The following motions are currently pending before the Court:

Motion	Filed	Briefing Status	Original Hearing Date	Current Hearing Date
Birnbaum & Godkin LLP's Motion to be Relieved as Counsel	January 8, 2019	Fully briefed	February 7, 2019	March 13, 2019
Stuart Gross and Gross & Klein LLP's Motion to be Relieved as Counsel	January 8, 2019	Fully briefed	February 7, 2019	March 13, 2019
Defendant Facebook, Inc.'s Motion to Seal	January 17, 2019	Motion filed	February 7, 2019	March 13, 2019

Motion	Filed	Briefing Status	Original Hearing Date	Current Hearing Date
Defendant Facebook, Inc.'s Motion to Open Discovery and to Compel	January 8, 2019	Motion filed	February 7, 2019	March 15, 2019
Defendants Mark Zuckerberg, Christopher Cox, Javien Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar's Motion for Attorneys' Fees and Costs Pursuant to California Code of Civil Procedure Section 25.16(c)	September 14, 2018	Fully briefed	December 7, 2018	March 15, 2019
Six4Three's Motion for Attorneys' Fees and Costs in Opposing Facebook's Special Motion to Strike (Anti-SLAPP)	September 21, 2018	Motion and opposition filed	January 11, 2019	March 15, 2019
Defendant Facebook, Inc.'s Motion to Seal	January 8, 2019	Motion filed	February 7, 2019	TBD

III. PROPOSED SCHEDULE

Event	Date
Hearing on <ul style="list-style-type: none"> Birnbaum & Godkin LLP's Motion to be Relieved as Counsel Stuart Gross and Gross & Klein LLP's Motion to be Relieved as Counsel Defendant Facebook, Inc.'s Motion to Seal (filed Jan. 17, 2019) 	March 13, 2019
Hearing on Defendant Facebook, Inc.'s Motion to Open Discovery and to Compel	March 15, 2019
Deadline for Six4Three to retain counsel, if the Court grants the motions to withdraw	March 27, 2019
Hearing on <ul style="list-style-type: none"> Defendants Mark Zuckerberg, Christopher Cox, Javien Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar's Motion for Attorneys' Fees and Costs Pursuant to California Code of Civil Procedure Section 425.16(c) Six4Three's Motion for Attorneys' Fees and Costs in Opposing Facebook's Special Motion to Strike (Anti-SLAPP) Defendant Facebook, Inc.'s Motion to Seal (filed Jan. 8, 2019) 	At the Court's earliest convenience, following the hearing on Defendant Facebook, Inc.'s Motion to Open Discovery and to Compel

Event	Date
Deadline for Six4Three, Birnbaum & Godkin, Gross & Klein, and Scaramellino to complete production of documents responsive to Facebook's Nov. 30, 2018 document requests	April 16, 2019
Completion of depositions of Mr. Kramer, Mr. Scaramellino, Mr. Godkin, Mr. Kruzer, and Mr. Gross	April 30, 2019
Facebook files motions for terminating sanctions, contempt	May 7, 2019
Hearing on Facebook's motions for terminating sanctions, contempt	May 29, 2019, or at the Court's earliest convenience

Dated: February 21, 2019

DURIE TANGRI LLP

By: _____


CATHERINE Y. KIM

Attorney for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox,
Javier Olivan, Samuel Lessin, Michael Vernal, and
Ilva Sukhar

PROOF OF SERVICE

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On February 21, 2019, I served the following documents in the manner described below:

DEFENDANTS' CASE MANAGEMENT STATEMENT

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from jposada@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

Stuart G. Gross
GROSS & KLEIN LLP
The Embarcadero, Pier 9, Suite 100
San Francisco, CA 94111
sgross@grosskleinlaw.com

David S. Godkin
James Kruzer
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, MA 02210
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

*Attorneys for Plaintiff
Six4Three, LLC*

Donald P. Sullivan
Wilson Elser
525 Market Street, 17th Floor
San Francisco, CA 94105
donald.sullivan@wilsonelser.com
Joyce.Vialpando@wilsonelser.com
Dea.Palumbo@wilsonelser.com

Attorney for Gross & Klein LLP

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com

*Attorney for Theodore Kramer and Thomas
Scaramellino (individual capacities)*

Steven J. Bolotin
Morrison Mahoney LLP
250 Summer Street
Boston, MA 02210
sbolotin@morrisonmahoney.com
llombard@morrisonmahoney.com

James A. Murphy
James A. Lassart
Thomas P Mazzucco
Joseph Leveroni
Murphy Pearson Bradley & Feeney
88 Kearny St, 10th Floor
San Francisco, CA 94108
JMurphy@MPBF.com
jlassart@mpbf.com
TMazzucco@MPBF.com
JLeveroni@MPBF.com

Attorney for Birnbaum & Godkin, LLP

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct. Executed on February 21, 2019, at San Francisco, California.

3
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5 Jennifer Posada
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EXHIBIT 9

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):		FOR COURT USE ONLY	
TELEPHONE NO.: _____ FAX NO. (Optional): _____ E-MAIL ADDRESS (Optional): _____ ATTORNEY FOR (Name): _____		ENDORSED FILED SAN MATEO COUNTY APR 30 2019 Clerk of the Superior Court By <u>R. Huerta</u> DEPUTY CLERK	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Mateo STREET ADDRESS: 400 County Center MAILING ADDRESS: _____ CITY AND ZIP CODE: Redwood City, CA 94063 BRANCH NAME: Southern Branch			
CASE NAME: SIX4THREE, LLC V. FACEBOOK, INC.		CASE NUMBER: CIV533328	
ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS COUNSEL—CIVIL		HEARING DATE: March 13, 2019	
		DEPT.: 23 TIME: 9:00 a.m. BEFORE HON.: V. Raymond Swope DATE ACTION FILED: April 10, 2015 TRIAL DATE: Not set	

- The motion of (name of attorney): Birnbaum & Godkin, LLP to be relieved as counsel of record for (name of client): Six4Three, LLC a party to this action or proceeding, came on regularly for hearing at the date, time, and place indicated above.
- The following persons were present at the hearing:
See Attachment 2.

FINDINGS

- Attorney has
 - ☐ personally served the client with papers in support of this motion.
 - ☐ served client by mail and submitted a declaration establishing that the service requirements of California Rules of Court, rule 3.1362, have been satisfied. **SEE ATTACHMENT 3**
- Attorney has shown sufficient reasons why the motion to be relieved as counsel should be granted and why the attorney has brought a motion under Code of Civil Procedure section 284(2) instead of filing a consent under section 284(1).

ORDER

- Attorney is relieved as counsel of record for client
 - ☐ effective upon the filing of the proof of service of this signed order upon the client.
 - ☐ effective on (specify date): _____
- The client's ☒ current ☐ last known address and telephone number:
Six4Three, LLC
1267 Chestnut Street, Apt. 6, San Francisco, CA 94109

If the client's current address is known, service on the client must hereafter be made at that address unless otherwise ordered in item 13. If the current address is not known, service must be made according to Code of Civil Procedure section 1011 (b) and rule 3.252 of the California Rules of Court.

- The next scheduled hearing in this action or proceeding is set for (date, time, and place):
May 3, 2019 at 2:00 p.m. at 400 County Center, Department 23, Redwood City, CA 94063 ("Dept. 23")
 - The hearing will concern (subject matter):
Motions to Seal

NOTICE TO CLIENT

You or your new attorney, if any, must prepare for and attend this hearing.

Page 1 of 2

CASE NAME: SIX4THREE, LLC V. FACEBOOK, INC.	CASE NUMBER: CIV533328
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8. The following additional hearings and other proceedings (including discovery matters) are set in this action (*describe the date, time, place, and subject matter of each*):
Motion to Seal set for July 19, 2019 at 2:00 p.m. in Dept. 23
9. The trial in this action or proceeding:
a. ☒ is not yet set.
b. ☐ is set for (*specify date, time, and place*):
10. Client is hereby notified of the following effects this order may have upon parties.

NOTICE TO CLIENT

Your present attorney will no longer be representing you. You may not in most cases represent yourself if you are one of the parties on the following list:

- A guardian
- A conservator
- A trustee
- A personal representative
- A probate fiduciary
- A corporation
- A guardian ad litem
- An unincorporated association

If you are one of these parties, YOU SHOULD IMMEDIATELY SEEK LEGAL ADVICE REGARDING LEGAL REPRESENTATION. Failure to retain an attorney may lead to an order striking the pleadings or to the entry of a default judgment.

11. Client is notified that, if the client will be representing himself or herself, the client shall be solely responsible for the case.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

You will not have an attorney representing you. You may wish to seek legal assistance. If you do not have a new attorney to represent you in this action or proceeding, and you are legally permitted to do so, you will be representing yourself. It will be your responsibility to comply with all court rules and applicable laws. If you fail to do so, or fail to appear at hearings, action may be taken against you. You may lose your case.

12. Client is notified that it is the client's duty to keep the court informed at all times of the client's current address.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

The court needs to know how to contact you. If you do not keep the court and other parties informed of your current address and telephone number, they will not be able to send you notices of actions that may affect you, including actions that may adversely affect your interests or result in your losing the case.

13. The court further orders (*specify*):
See Attachment 13.

Date: APR 29 2019


JUDGE OR JUDICIAL OFFICER

Attachment 2



SUPERIOR COURT OF SAN MATEO COUNTY
 400 County Center 1050 Mission Road
 Redwood City, CA 94063 South San Francisco, CA 94080
 www.sanmateocourt.org

Minute Order

**SIX4THREE, LLC, A DELAWARE LIMITED LIABILITY COMPANY vs.
 FACEBOOK, INC, A DELAWARE CORPORATION, et. al.**

CIV533328

03/13/2019 9:00 AM
 Motion to be Relieved as
 Counsel
Hearing Result: Held

Judicial Officer: Swope, V. Raymond
Courtroom Clerk: Rebecca Huerta

Location: Courtroom 8A
Courtroom Reporter: Geraldine Vandeveld

Parties Present

GODKIN, DAVID S.	Attorney
GROSS, STUART G	Attorney
KIM, CATHERINE Y.	Attorney
LERNER, JOSHUA H	Attorney
MEHTA, SONAL N	Attorney
MILLER, LAURA E.	Attorney
RUSSO, JACK	Attorney

Exhibits

Minutes

Journals

- At 9:12 a.m. - Court convenes.

Also present JAMES MURPHY & JAMES LASSART appeared with and for David Godkin and Birnbaum & Godkin.

Also present DONALD SULLIVAN appeared with Stuart G Gross.

Also present NATALIE NAGLE in house counsel for Facebook, et al.

Also present JACK RUSSO on behalf of Third Party Theodore Kramer & Thomas Scaramellino.

Also present: ZACHARY ABRAHMSON on behalf of Facebook, et al.

The Court announces it will conduct an in camera review with Mr. Godkin, Mr. Gross, Mr. Kramer and Mr. Scaramellino. Also, Court states it will not ask questions that maybe incriminating or needing to assert 5th amendment.

Furthermore, the Court after in camera hearing shall have the proceedings sealed.

Mr Russo objects and requests to be present at the in camera hearing. The Court denies Mr. Russo's request.

All counsel, parties and public are ordered to vacate the courtroom.

At 9:19 a.m. - Court recess.

At 9:27 a.m. - Court reconvenes.

This portion of the hearing is closed to all parties, counsel and public except for the people mentioned below:

Parties present Mr. Gross, Mr. Godkin, Mr. Kramer and Mr. Scaramelino. No other counsel, parties or public are present.

At 9:28 a.m.- Parties are sworn.

The Court asks Mr. Kramer a question.

Mr. Kramer will not waive attorney/client privilege.

At 9:32 a.m.-Hearing is concluded.

At 9:32 a.m. - Court recesses.

At 9:42 a.m. - Court reconvenes. Above-noted counsel and parties present.

This portion of the hearing is open to be public.

The Court returns Mr. Gross his retainer agreement.

The court finds there is no conflict between attorney and clients and without further evidence. MOTION TO WITHDRAW AS ATTORNEY OF RECORD is DENIED without prejudice.

The Court informs parties motion to be heard on Friday shall proceed.

Further, the Court orders Mr. Godkin to file a notice of errata as to Declaration of David S. Godkin in support of Plaintiff's motion for attorneys fees and costs missing exhibits. Said notice of errata shall be filed by today at the end of business day.

At 9:53 a.m.- Parties argue as to the tentative ruling.

At 10:39 a.m.-Arguments are concluded.

Having considered the submitted matter, the court rules as follows:

The Court vacates its previous tentative ruling and shall take the matter under submission.

Friday's hearing shall go forward.

Mr. Godkin may appear telephonically.

The Court orders Mr. Frizzora and Mr. Dehaney to file a declaration in regards to documents

At 10:41 a.m.-Court adjourned.

Case Events

- Matter Taken Under Submission; Due: June 11, 2019; Matter under submission:MOTION TO WITHDRAW AS COUNSEL OF RECORD

Judicial officer:

Others

Comments:

Future Hearings and Vacated Hearings

March 13, 2019 9:00 AM Motion to be Relieved as Counsel
Vandeveld, Geraldine

Swope, V. Raymond
Huerta, Rebecca
Courtroom 8A

March 15, 2019 10:00 AM Motion to Seal
Swope, V. Raymond

March 15, 2019 10:00 AM Motion to Compel
Swope, V. Raymond

March 15, 2019 10:00 AM Motion for Attorney Fees
Swope, V. Raymond

March 15, 2019 10:00 AM Motion for Attorney Fees
Swope, V. Raymond

March 15, 2019 10:00 AM Complex Case Status Conference
Swope, V. Raymond

Canceled: April 18, 2019 9:00 AM Pretrial hearing
Reason: Canceled as the result of a hearing cancel, Hearing Canceled Reason: Vacated
Weiner, Marie S.

Canceled: April 25, 2019 9:00 AM Jury Trial
Reason: Canceled as the result of a hearing cancel, Hearing Canceled Reason: Vacated
Weiner, Marie S.

Attachment 3

Attachment 3

Mr. Godkin failed to comply with California Rules of Court, rule 3.1362(d)(1) and (2). (See Godkin Dec., filed Jan. 8, 2019, ¶ 3.)

On January 24, 2019, CEO and Managing Member of Plaintiff SIX4THREE, LLC Theodore Kramer filed a declaration regarding this motion acknowledging receipt of Birnbaum & Godkin's Motion to be Relieved as Counsel. On March 13, 2019, Mr. Kramer appeared at the hearing on this motion.

Based on the foregoing, the Court finds that Birnbaum & Godkin properly effectuated service of this motion on its client Plaintiff SIX4THREE, LLC.

Attachment 13

Attachment 13

The Court FURTHER ORDERS:

(1) Notwithstanding being relieved as counsel and Stipulated Protective Order, issued October 24, 2016, paragraph 11, Plaintiff SIX4THREE, LLC's counsel Stuart Gross and David Godkin and their respective firms, Gross & Klein, LLP and Birnbaum & Godkin, LLP (collectively "Plaintiff's Counsel"), shall take any and all measures to maintain and preserve in their possession, custody, and/or control any and all records (and/or copies thereof as discussed in Paragraph 3, *infra*), including but not limited to "[c]lient materials and property" as defined in California Rules of Professional Conduct, rule 1.16(e)(1) ("Rule 1.16") and any other communications, discovery, documents, notes, reports, memoranda and/or files, whether in tangible, electronic or other form, relating in any way to this action (collectively "Six4Three File") **until further order of the Court.** (See Kramer Dec. re: Motions to be Relieved as Counsel, filed Jan. 24, 2019, ¶ 17 ("Kramer Dec.").)

(2) Except those portions that have been either publicly filed or unsealed by the Court in this action, Plaintiff's Counsel shall not release any "[c]lient materials and property" pursuant to Rule 1.16(e)(1) to Plaintiff SIX4THREE, LLC ("Plaintiff") that contain, in any way, Defendant FACEBOOK, INC.'s confidential or highly confidential information and/or documents obtained pursuant to the Stipulated Protective Order **to any person and/or entity other than Plaintiff's new counsel.** Plaintiff's new counsel shall comply with the Stipulated Protective Order.

(3) Prior to any release of the "[c]lient materials and property" in accordance with Rule 1.16(e)(1), Plaintiff's Counsel shall make, maintain and preserve a copy of the Six4Three File, in its entirety, **until further order of the Court.** (See Rule 1.16, Comment 6 ("Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding").)

(4) Plaintiff's CEO and Managing Member Theodore Kramer shall inform the Court and all other parties, by email, of any change in Plaintiff SIX4THREE, LLC's corporate status or contact

1 information, including but not limited to the mailing address, telephone number and email address,
2 **within one court day of any such change.**

3 (5) The discovery stay ordered in Case Management Order no. 23, issued on April 22, 2019,
4 and in accordance with the Alternative Writ, issued on April 19, 2019, is LIFTED with the Court's
5 ruling on the motions to be relieved as counsel. In light of the instant order, the Court takes no
6 position at this time whether discovery or other matters may proceed as to the alleged violations and
7 continuing violations of the Stipulated Protective Order committed by individual actors.

8 (6) The stay on the merits of the action remains in effect pending the parties' appeals to the
9 anti-SLAPP motions. (See Court of Appeal nos. A154890 and A155334.)

10 (7) In his declaration, filed January 24, 2019, Mr. Kramer requested that Plaintiff "be given
11 until May 31, 2019 to retain new counsel." (Kramer Dec., *supra*, at ¶ 16.) Plaintiff shall promptly
12 file and electronically serve its substitution of counsel. A Case Management Conference regarding
13 Plaintiff's status of retention of new counsel is set for **June 28, 2019 at 2:00 p.m.** in Department 23.
14 Case Management Conference statements addressing Plaintiff's retention of counsel shall be filed
15 and electronically served no later than June 21, 2019. (But see Friedman, Cal. Prac. Guide: Corps.
16 (Rutter, Feb. 2019 Update) ¶ 2:37.2 ("Although a corporation can sue or be sued in its name, *it*
17 *cannot appear in court 'in propria persona'* ").)

18 (8) The hearing on the motions to seal is **continued from May 3, 2019 to July 19, 2019 at**
19 **2:00 p.m.** in Department 23.

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):		FOR COURT USE ONLY	
TELEPHONE NO.: E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):		ENDORSED FILED SAN MATEO COUNTY APR 30 2019 Clerk of the Superior Court By <u>R. Huerta</u> DEPUTY CLERK	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Mateo STREET ADDRESS: 400 County Center MAILING ADDRESS: CITY AND ZIP CODE: Redwood City, CA 94063 BRANCH NAME: Southern Branch		CASE NUMBER: CIV533328	
CASE NAME: SIX4THREE, LLC V. FACEBOOK, INC.		HEARING DATE: March 13, 2019 DEPT.: 23 TIME: 9:00 a.m. BEFORE HON.: V. Raymond Swope DATE ACTION FILED: April 10, 2015 TRIAL DATE: Not set	
ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS COUNSEL—CIVIL			

- The motion of (name of attorney): Stuart Gross and Gross & Klein LLP to be relieved as counsel of record for (name of client): Six4Three, LLC a party to this action or proceeding, came on regularly for hearing at the date, time, and place indicated above.
- The following persons were present at the hearing:
See Attachment 2.

FINDINGS

- Attorney has
 - ☐ personally served the client with papers in support of this motion.
 - ☒ served client by mail and submitted a declaration establishing that the service requirements of California Rules of Court, rule 3.1362, have been satisfied.
- Attorney has shown sufficient reasons why the motion to be relieved as counsel should be granted and why the attorney has brought a motion under Code of Civil Procedure section 284(2) instead of filing a consent under section 284(1).

ORDER

- Attorney is relieved as counsel of record for client
 - ☐ effective upon the filing of the proof of service of this signed order upon the client.
 - ☐ effective on (specify date):
- The client's ☒ current ☐ last known address and telephone number:
Six4Three, LLC
1267 Chestnut Street, Apt. 6, San Francisco, CA 94109

If the client's current address is known, service on the client must hereafter be made at that address unless otherwise ordered in item 13. If the current address is not known, service must be made according to Code of Civil Procedure section 1011 (b) and rule 3.252 of the California Rules of Court.

- The next scheduled hearing in this action or proceeding is set for (date, time, and place):
May 3, 2019 at 2:00 p.m. at 400 County Center, Department 23, Redwood City, CA 94063 ("Dept. 23")
 - The hearing will concern (subject matter):
Motions to Seal

NOTICE TO CLIENT

You or your new attorney, if any, must prepare for and attend this hearing.

Page 1 of 2

CASE NAME: SIX4THREE, LLC V. FACEBOOK, INC.	CASE NUMBER: CIV533328
--	---------------------------

8. The following additional hearings and other proceedings (including discovery matters) are set in this action (*describe the date, time, place, and subject matter of each*):
Motion to Seal set for July 19, 2019 at 2:00 p.m. in Dept. 23
9. The trial in this action or proceeding:
a. ☒ is not yet set.
b. ☐ is set for (*specify date, time, and place*):
10. Client is hereby notified of the following effects this order may have upon parties.

NOTICE TO CLIENT

Your present attorney will no longer be representing you. You may not in most cases represent yourself if you are one of the parties on the following list:

- A guardian
- A conservator
- A trustee
- A personal representative
- A probate fiduciary
- A corporation
- A guardian ad litem
- An unincorporated association

If you are one of these parties, YOU SHOULD IMMEDIATELY SEEK LEGAL ADVICE REGARDING LEGAL REPRESENTATION. Failure to retain an attorney may lead to an order striking the pleadings or to the entry of a default judgment.

11. Client is notified that, if the client will be representing himself or herself, the client shall be solely responsible for the case.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

You will not have an attorney representing you. You may wish to seek legal assistance. If you do not have a new attorney to represent you in this action or proceeding, and you are legally permitted to do so, you will be representing yourself. It will be your responsibility to comply with all court rules and applicable laws. If you fail to do so, or fail to appear at hearings, action may be taken against you. You may lose your case.

12. Client is notified that it is the client's duty to keep the court informed at all times of the client's current address.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED

The court needs to know how to contact you. If you do not keep the court and other parties informed of your current address and telephone number, they will not be able to send you notices of actions that may affect you, including actions that may adversely affect your interests or result in your losing the case.

13. The court further orders (*specify*):
See Attachment 13.

Date: APR 29 2019


JUDGE OR JUDICIAL OFFICER

Attachment 2



SUPERIOR COURT OF SAN MATEO COUNTY
 400 County Center 1050 Mission Road
 Redwood City, CA 94063 South San Francisco, CA 94080
 www.sanmateocourt.org

Minute Order

**SIX4THREE, LLC, A DELAWARE LIMITED LIABILITY COMPANY vs.
 FACEBOOK, INC, A DELAWARE CORPORATION, et. al.**

CIV533328

03/13/2019 9:00 AM
 Motion to be Relieved as
 Counsel
Hearing Result: Held

Judicial Officer: Swope, V. Raymond
Courtroom Clerk: Rebecca Huerta

Location: Courtroom 8A
Courtroom Reporter: Geraldine Vandeveld

Parties Present

GODKIN, DAVID S.	Attorney
GROSS, STUART G	Attorney
KIM, CATHERINE Y.	Attorney
LERNER, JOSHUA H	Attorney
MEHTA, SONAL N	Attorney
MILLER, LAURA E.	Attorney
RUSSO, JACK	Attorney

Exhibits

Minutes

Journals

- At 9:12 a.m. - Court convenes.

Also present JAMES MURPHY & JAMES LASSART appeared with and for David Godkin and Birnbaum & Godkin.

Also present DONALD SULLIVAN appeared with Stuart G Gross.

Also present NATALIE NAGLE in house counsel for Facebook, et al.

Also present JACK RUSSO on behalf of Third Party Theodore Kramer & Thomas Scaramellino.

Also present: ZACHARY ABRAHMSON on behalf of Facebook, et al.

The Court announces it will conduct an in camera review with Mr. Godkin, Mr. Gross, Mr. Kramer and Mr. Scaramellino. Also, Court states it will not ask questions that maybe incriminating or needing to assert 5th amendment.

Furthermore, the Court after in camera hearing shall have the proceedings sealed.

Mr Russo objects and requests to be present at the in camera hearing. The Court denies Mr. Russo's request.

All counsel, parties and public are ordered to vacate the courtroom.

At 9:19 a.m. - Court recess.

At 9:27 a.m. - Court reconvenes.

This portion of the hearing is closed to all parties, counsel and public except for the people mentioned below:

Parties present Mr. Gross, Mr. Godkin, Mr. Kramer and Mr. Scaramelino. No other counsel, parties or public are present.

At 9:28 a.m.- Parties are sworn.

The Court asks Mr. Kramer a question.

Mr. Kramer will not waive attorney/client privilege.

At 9:32 a.m.-Hearing is concluded.

At 9:32 a.m. - Court recesses.

At 9:42 a.m. - Court reconvenes. Above-noted counsel and parties present.

This portion of the hearing is open to be public.

The Court returns Mr. Gross his retainer agreement.

The court finds there is no conflict between attorney and clients and without further evidence, MOTION TO WITHDRAW AS ATTORNEY OF RECORD is DENIED without prejudice.

The Court informs parties motion to be heard on Friday shall proceed.

Further, the Court orders Mr. Godkin to file a notice of errata as to Declaration of David S. Godkin in support of Plaintiff's motion for attorneys fees and costs missing exhibits. Said notice of errata shall be filed by today at the end of business day.

At 9:53 a.m.- Parties argue as to the tentative ruling.

At 10:39 a.m.-Arguments are concluded.

Having considered the submitted matter, the court rules as follows:

The Court vacates its previous tentative ruling and shall take the matter under submission.

Friday's hearing shall go forward.

Mr. Godkin may appear telephonically.

The Court orders Mr. Frizzora and Mr. Dehaney to file a declaration in regards to documents

At 10:41 a.m.-Court adjourned.

Case Events

- Matter Taken Under Submission; Due: June 11, 2019; Matter under submission:MOTION TO WITHDRAW AS COUNSEL OF RECORD
Judicial officer:

Others

Comments:

Future Hearings and Vacated Hearings

March 13, 2019 9:00 AM Motion to be Relieved as Counsel
Vandeveld, Geraldine

Swope, V. Raymond
Huerta, Rebecca
Courtroom 8A

March 15, 2019 10:00 AM Motion to Seal
Swope, V. Raymond

March 15, 2019 10:00 AM Motion to Compel
Swope, V. Raymond

March 15, 2019 10:00 AM Motion for Attorney Fees
Swope, V. Raymond

March 15, 2019 10:00 AM Motion for Attorney Fees
Swope, V. Raymond

March 15, 2019 10:00 AM Complex Case Status Conference
Swope, V. Raymond

Canceled: April 18, 2019 9:00 AM Pretrial hearing
Reason: Canceled as the result of a hearing cancel, Hearing Canceled Reason: Vacated
Weiner, Marie S.

Canceled: April 25, 2019 9:00 AM Jury Trial
Reason: Canceled as the result of a hearing cancel, Hearing Canceled Reason: Vacated
Weiner, Marie S.

Attachment 13

Attachment 13

The Court FURTHER ORDERS:

(1) Notwithstanding being relieved as counsel and Stipulated Protective Order, issued October 24, 2016, paragraph 11, Plaintiff SIX4THREE, LLC's counsel Stuart Gross and David Godkin and their respective firms, Gross & Klein, LLP and Birnbaum & Godkin, LLP (collectively "Plaintiff's Counsel"), shall take any and all measures to maintain and preserve in their possession, custody, and/or control any and all records (and/or copies thereof as discussed in Paragraph 3, *infra*), including but not limited to "[c]lient materials and property" as defined in California Rules of Professional Conduct, rule 1.16(e)(1) ("Rule 1.16") and any other communications, discovery, documents, notes, reports, memoranda and/or files, whether in tangible, electronic or other form, relating in any way to this action (collectively "Six4Three File") **until further order of the Court.** (See Kramer Dec. re: Motions to be Relieved as Counsel, filed Jan. 24, 2019, ¶ 17 ("Kramer Dec.").)

(2) Except those portions that have been either publicly filed or unsealed by the Court in this action, Plaintiff's Counsel shall not release any "[c]lient materials and property" pursuant to Rule 1.16(e)(1) to Plaintiff SIX4THREE, LLC ("Plaintiff") that contain, in any way, Defendant FACEBOOK, INC.'s confidential or highly confidential information and/or documents obtained pursuant to the Stipulated Protective Order **to any person and/or entity other than Plaintiff's new counsel.** Plaintiff's new counsel shall comply with the Stipulated Protective Order.

(3) Prior to any release of the "[c]lient materials and property" in accordance with Rule 1.16(e)(1), Plaintiff's Counsel shall make, maintain and preserve a copy of the Six4Three File, in its entirety, **until further order of the Court.** (See Rule 1.16, Comment 6 ("Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding").)

(4) Plaintiff's CEO and Managing Member Theodore Kramer shall inform the Court and all other parties, by email, of any change in Plaintiff SIX4THREE, LLC's corporate status or contact

1 information, including but not limited to the mailing address, telephone number and email address,
2 **within one court day of any such change.**

3 (5) The discovery stay ordered in Case Management Order no. 23, issued on April 22, 2019,
4 and in accordance with the Alternative Writ, issued on April 19, 2019, is LIFTED with the Court's
5 ruling on the motions to be relieved as counsel. In light of the instant order, the Court takes no
6 position at this time whether discovery or other matters may proceed as to the alleged violations and
7 continuing violations of the Stipulated Protective Order committed by individual actors.

8 (6) The stay on the merits of the action remains in effect pending the parties' appeals to the
9 anti-SLAPP motions. (See Court of Appeal nos. A154890 and A155334.)

10 (7) In his declaration, filed January 24, 2019, Mr. Kramer requested that Plaintiff "be given
11 until May 31, 2019 to retain new counsel." (Kramer Dec., *supra*, at ¶ 16.) Plaintiff shall promptly
12 file and electronically serve its substitution of counsel. A Case Management Conference regarding
13 Plaintiff's status of retention of new counsel is set for **June 28, 2019 at 2:00 p.m.** in Department 23.
14 Case Management Conference statements addressing Plaintiff's retention of counsel shall be filed
15 and electronically served no later than June 21, 2019. (But see Friedman, Cal. Prac. Guide: Corps.
16 (Rutter, Feb. 2019 Update) ¶ 2:37.2 ("Although a corporation can sue or be sued in its name, *it*
17 *cannot appear in court 'in propria persona'* ").)

18 (8) The hearing on the motions to seal is **continued from May 3, 2019 to July 19, 2019 at**
19 **2:00 p.m.** in Department 23.

AFFIDAVIT OF MAILING & ELECTRONIC MAILING

CASE NO. CIV533328

**DOCUMENT: ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS
COUNSEL-CIVIL(STUART GROSS AND GROSS & KLIEN LLP)**

**ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS
COUNSEL-CIVIL(BIRNBAUM & GODKIN, LLP)**

**ENDORSED FILED
SAN MATEO COUNTY**

SIX4THREE LLC,

APR 30 2019

vs.

**Clerk of the Superior Court
By R. Huerta
DEPUTY CLERK**

FACEBOOK, INC.et al,

I declare under penalty of perjury that on the following date I served:

By depositing in the United States Post Office mail box at Redwood City, California a true and correct copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon addressed as set forth below; and

By electronically mailing a true and correct copy of the foregoing document through San Mateo Superior Court's electronic mail system from rhuerta@sanmateocourt.org to the email addresses as set forth below.

STUART G. GROSS, ESQ
BENJAMIN H. KLEIN,ESQ
GROSS & KLEIN LLP
The Embarcadero, Pier 9,Suite 100
San Francisco, CA 94111

sgross@grosskleinlaw.com
bklein@grosskleinlaw.com

DAVID GODKIN, ESQ
JAMES KRUZER, ESQ
BIRNBAUM & GODKIN LLP
280 Summers Street
Boston, MA 02210

godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

JOSHUA LERNER, ESQ
SONAL MEHTA, ESQ
LAURA MILLER, ESQ
CATHERINE KIM, ESQ
DURIE TANGRI LLP
217 Leidesdorff Street
San Francisco, CA 94111

jlerner@durietangri.com
smehta@durietangri.com
lmiller@durietangri.com
ckim@durietangri.com
service-six4three@durietangri.com

JACK RUSSO,ESQ.
CHRISTOPHER SARGENT,ESQ.
COMPUTER LAW GROUP LLP
401 Florence Street
Palo Alto, CA 94301

jrusso@computerlaw.com
csargent@computerlaw.com

THOMAS MAZZUCCO,ESQ.
JOSEPH S. LEVERONI, ESQ.
MURPHY PEARSON BRADLEY & FEENEY
88 Kearney Street, 10th Floor
San Francisco, CA 94108

tmazzucco@mpbf.com
jleveroni@mpbf.com

DONALD P. SULLIVAN,ESQ.
WILSON ELSE
525 Market Street, 17th Floor
San Francisco, CA 94105

donald.sullivan@wilsonelser.com

Executed on April 30, 2019
at Redwood City, California 94063
CLERK OF THE SUPERIOR COURT

By **R. HUERTA**
Rebecca Huerta, Deputy Courtroom Clerk

EXHIBIT 10

1 DURIE TANGRI LLP
2 SONAL N. MEHTA (SBN 222086)
3 smehta@durietangri.com
4 JOSHUA H. LERNER (SBN 220755)
5 jlerner@durietangri.com
6 LAURA E. MILLER (SBN 271713)
7 lmiller@durietangri.com
8 CATHERINE Y. KIM (SBN 308442)
9 ckim@durietangri.com
10 ZACHARY G. F. ABRAHAMSON (SBN 310951)
11 zabrahamson@durietangri.com
12 217 Leidesdorff Street
13 San Francisco, CA 94111
14 Telephone: 415-362-6666
15 Facsimile: 415-236-6300

16 Attorneys for Defendants
17 Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
18 Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA
20 COUNTY OF SAN MATEO

21 SIX4THREE, LLC, a Delaware limited liability
22 company,

23 Plaintiff,

24 v.

25 FACEBOOK, INC., a Delaware corporation;
26 MARK ZUCKERBERG, an individual;
27 CHRISTOPHER COX, an individual;
28 JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

FILED
SAN MATEO COUNTY

JUN 19 2019

Clerk of the Superior Court

By

M. Cis
DEPUTY CLERK

CIV533328
ORD
Order
1889047



Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

~~PROPOSED~~ ORDER REGARDING
RETENTION OF COUNSEL BY PLAINTIFF
SIX4THREE, LLC AND SETTING CASE
MANAGEMENT CONFERENCE FOR JULY
19, 2019

Date: June 7, 2019
Time: 2:00 p.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

RECEIVED
JUN 18 2019
CLERK OF THE SUPERIOR COURT
SAN MATEO COUNTY

1 DURIE TANGRI LLP
2 SONAL N. MEHTA (SBN 222086)
3 smehta@durietangri.com
4 JOSHUA H. LERNER (SBN 220755)
5 jlerner@durietangri.com
6 LAURA E. MILLER (SBN 271713)
7 lmiller@durietangri.com
8 CATHERINE Y. KIM (SBN 308442)
9 ckim@durietangri.com
10 ZACHARY G. F. ABRAHAMSON (SBN 310951)
11 zabrahamson@durietangri.com
12 217 Leidesdorff Street
13 San Francisco, CA 94111
14 Telephone: 415-362-6666
15 Facsimile: 415-236-6300

16 Attorneys for Defendants
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18 Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA
20 COUNTY OF SAN MATEO

21 SIX4THREE, LLC, a Delaware limited liability
22 company,

23 Plaintiff,

24 v.

25 FACEBOOK, INC., a Delaware corporation;
26 MARK ZUCKERBERG, an individual;
27 CHRISTOPHER COX, an individual;
28 JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

FILED
SAN MATEO COUNTY

JUN 19 2019

Clerk of the Superior Court

By

M. Cis
DEPUTY CLERK

CIV533328
ORD
Order
1889047



Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

**~~PROPOSED~~ ORDER REGARDING
RETENTION OF COUNSEL BY PLAINTIFF
SIX4THREE, LLC AND SETTING CASE
MANAGEMENT CONFERENCE FOR JULY
19, 2019**

Date: June 7, 2019
Time: 2:00 p.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

RECEIVED
JUN 18 2019
CLERK OF THE SUPERIOR COURT
SAN MATEO COUNTY

1 On May 31, 2019, the CEO of Plaintiff Six4Three, LLC ("Six4Three"), Theodore Kramer,
2 submitted a declaration regarding Six4Three's retention of counsel. That declaration indicated that
3 Six4Three had not yet retained counsel.

4 At the June 7, 2019 case management conference, Mr. Kramer appeared by phone and confirmed
5 that Six4Three had not retained counsel. The Court found that Mr. Kramer had been dilatory in retaining
6 counsel and requested that Mr. Kramer do so forthwith.

7 In light of the foregoing, IT IS HEREBY ORDERED THAT:

- 8 1. Defendant Facebook, Inc.'s *Ex Parte* Application for an Order to Compel Attendance of
9 Theodore Kramer is DENIED as moot.
- 10 2. Six4Three shall retain counsel no later than 5:00 p.m. PDT on June 28, 2019.
- 11 3. Six4Three, by and through counsel, shall file and electronically serve a declaration no later
12 than 5:00 p.m. PDT on July 1, 2019. That declaration shall state that Six4Three has retained
13 counsel or attest to the nature and status of Six4Three's efforts to do so. In the event that
14 Six4Three does not retain counsel by June 28, 2019, the Court directs ComputerLaw Group,
15 LLP to assist Mr. Kramer in filing Six4Three's declaration.
- 16 4. A further case management conference is hereby scheduled for 2:00 p.m. PDT on July 19,
17 2019. The parties shall file and electronically serve case management statements by July 12,
18 2019.

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20 **IT IS SO ORDERED.**

21
22
23 Dated: JUN 19 2019

24 
25 HON. V. RAYMOND SWOPE
26 SUPERIOR COURT JUDGE
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PROOF OF SERVICE

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On June 10, 2019, I served the following documents in the manner described below:

[PROPOSED] ORDER REGARDING RETENTION OF COUNSEL BY PLAINTIFF SIX4THREE, LLC AND SETTING CASE MANAGEMENT CONFERENCE FOR JULY 19, 2019

- ☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California.
- ☒ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.
- ☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.
- ☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.
- ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from zabrahamson@durietangri.com to the email addresses set forth below.
- ☐ (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.

On the following part(ies) in this action:

VIA MESSENGER SERVICE & EMAIL

Theodore Kramer
1267 Chestnut St., Apt. 6
San Francisco, CA 94109
ted@six4three.com

Agent for Service of Process for Six4Three, LLC

VIA EMAIL ONLY

Stuart G. Gross
GROSS & KLEIN LLP
The Embarcadero, Pier 9, Suite 100

VIA EMAIL ONLY

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com

Attorney for Theodore Kramer and Thomas Scaramellino (individual capacities)

San Francisco, CA 94111
sgross@grosskleinlaw.com

VIA EMAIL ONLY

David S. Godkin
James Kruzer
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, MA 02210
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

VIA EMAIL ONLY

Donald P. Sullivan
Wilson Elser
525 Market Street, 17th Floor
San Francisco, CA 94105
donald.sullivan@wilsonelser.com
Joyce.Vialpando@wilsonelser.com
Dea.Palumbo@wilsonelser.com

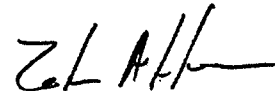
Attorney for Gross & Klein LLP

VIA EMAIL ONLY

James A. Murphy
James A. Lassart
Thomas P Mazzucco
Joseph Leveroni
Murphy Pearson Bradley & Feeney
88 Kearny St, 10th Floor
San Francisco, CA 94108
JMurphy@MPBF.com
jlassart@mpbf.com
TMazzucco@MPBF.com
JLeveroni@MPBF.com

Attorney for Birnbaum & Godkin, LLP

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 10, 2019, at San Francisco, California.



ZACHARY G.F. ABRAHAMSON

EXHIBIT 11

FILED
SAN MATEO COUNTY

AUG 01 2019

Clerk of the Superior Court
By  DEPUTY CLERK

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
ZACHARY G. F. ABRAHAMSON (SBN 310951)
zabrahamson@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

D23
Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

~~PROPOSED~~ ORDER RE: SIX4THREE,
LLC'S RETENTION OF COUNSEL AND
SETTING CASE MANAGEMENT
CONFERENCE

Date: July 19, 2019
Time: 2:00 p.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015

CIV533328
ORD
Order
1967552



1 At the June 7, 2019 case management conference, the Court ordered Plaintiff Six4Three, LLC
2 (“Six4Three”) to retain counsel to fully represent Six4Three, including for discovery proceedings, so that
3 this case could proceed. Order Regarding Retention of Counsel by Pl. Six4Three, LLC and Setting Case
4 Mgmt. Conference for July 19, 2019 at 1 (June 19, 2019) (“Counsel Retention Order”). The Court
5 explicitly ordered Mr. Kramer “to retain counsel so that [Six4Three] can defend against any actions that
6 may be pursued by Facebook.” Hr’g Tr. at 8:8–10 (June 7, 2019). If Mr. Kramer could not find “a one
7 size fits all firm that handles corporate representation in litigation as well as a contempt citation[,]” then
8 Mr. Kramer would “need a second lawyer that specializes in defending contempt citations.” *Id.* at 4:23–
9 5:4.

10 Mr. Kramer did not comply with this Court’s previous order. Six4Three’s retention of
11 Macdonald Fernandez LLP was for a limited scope only, and did not encompass discovery or full
12 representation for this case. Notice of Limited Scope Representation (July 2, 2019). At the July 19,
13 2019 case management conference, Six4Three’s limited scope counsel could not answer this Court’s
14 questions regarding the scope of Macdonald Fernandez LLP’s representation of Six4Three.

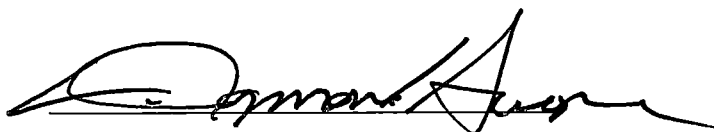
15 In light of the foregoing, IT IS HEREBY ORDERED THAT:

- 16 1. A further case management conference is set for August 7, 2019, at 9:00 a.m.
- 17 2. Before the August 7, 2019 case management conference, Six4Three shall retain full-scope
18 representation for this case, including discovery matters. Six4Three’s full-scope counsel shall appear at
19 the August 7, 2019 case management conference.
- 20 3. The parties shall brief a motion regarding discovery into the disclosure of Facebook’s
21 Confidential and Highly Confidential information, and the proposed timing and sequence of potential
22 requests for relief by Facebook. All documents shall be filed and electronically served, with courtesy
23 copies hand-delivered to the Court on the day of filing.
 - 24 a. Facebook’s motion is due on July 24, 2019 at 5 p.m.
 - 25 b. Six4Three’s opposition is due on July 31, 2019 at 5 p.m.
 - 26 c. Facebook’s reply is due on August 2, 2019 at 5 p.m.

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IT IS SO ORDERED.

Dated: JUL 31 2019



HON. V. RAYMOND SWOPE
SUPERIOR COURT JUDGE

1 **PROOF OF SERVICE**

2 I am employed in San Francisco County, State of California, in the office of a member of the bar
3 of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a
4 party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

5 On July 29, 2019, I served the following documents in the manner described below:

6 **[PROPOSED] ORDER RE: SIX4THREE, LLC'S RETENTION OF COUNSEL AND**
7 **SETTING CASE MANAGEMENT CONFERENCE**

8 ☒ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie
9 Tangri LLP for collection and processing of correspondence for mailing with the United
10 States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to
11 be placed in the United States Postal Service at San Francisco, California.

12 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through
13 Durie Tangri's electronic mail system from CKim@durietangri.com to the email
14 addresses set forth below.

15 On the following part(ies) in this action:

16 **VIA U.S. MAIL & EMAIL**

17 Reno F.R. Fernandez III
18 Matthew J. Olson
19 Macdonald Fernandez LLP
20 221 Sansome Street, Third Floor
21 San Francisco, CA 94104
22 Reno@MacFern.com
23 Matt@MacFern.com

24 *Attorneys for Plaintiff Six4Three, LLC*

25 **VIA EMAIL ONLY**

26 Stuart G. Gross
27 GROSS & KLEIN LLP
28 The Embarcadero, Pier 9, Suite 100
San Francisco, CA 94111
sgross@grosskleinlaw.com

VIA EMAIL ONLY

David S. Godkin
James Kruzer
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, MA 02210
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

VIA EMAIL ONLY

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com

*Attorney for Theodore Kramer and Thomas
Scaramellino (individual capacities)*

VIA EMAIL ONLY

James A. Murphy
James A. Lassart
Thomas P Mazzucco
Joseph Leveroni
Murphy Pearson Bradley & Feeney
88 Kearny St, 10th Floor
San Francisco, CA 94108
JMurphy@MPBF.com
jlassart@mpbf.com
TMazzucco@MPBF.com
JLeveroni@MPBF.com

Attorney for Birnbaum & Godkin, LLP

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct. Executed on July 29, 2019, at San Francisco, California.
3

4 
5 Catherine Y. Kim

EXHIBIT 12

From: Matthew Olson <Matt@MacFern.com>
Sent: Tuesday, July 23, 2019 5:54 PM
To: Catherine Kim; Reno Fernandez; sgross@grosskleinlaw.com; kruzer@birnbaumgodkin.com; godkin@birnbaumgodkin.com; Jack Russo; Chris Sargent; James Murphy; James Lassart; Thomas Mazzucco; Joseph Leveroni; ECF Notices
Cc: SERVICE-SIX4THREE
Subject: RE: SERVICE: Six4Three, LLC v. Facebook, Inc. et al. CIV 533328
Attachments: Order Setting CMC for 2019-08-07 DRAFT.docx

Ms. Kim:

We don't believe that the proposed form of order conforms to what the Court ordered at the hearing, it purports to make factual findings that the Court did not make, and is argumentative. A proposed revised form of order which conforms with the orders made at the hearing and without the purported findings and argument is attached.

Best,

Matt

Matthew J. Olson, Associate Attorney
MACDONALD | FERNANDEZ LLP
Estate Planning • Business Matters • Commercial Litigation • Bankruptcy

221 Sansome Street, Third Floor
San Francisco, CA 94104
Tel: (415) 362-0449 Ext. 205 | Fax: (415) 394-5544
matt@macfern.com | www.macfern.com

Modesto Office
914 Thirteenth Street
Modesto, CA 95354
Tel: (209) 521-8100 | Fax: (415) 394-5544

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From: Catherine Kim <CKim@durietangri.com>
Sent: Monday, July 22, 2019 4:22 PM
To: Reno Fernandez <Reno@MacFern.com>; Matthew Olson <Matt@MacFern.com>; sgross@grosskleinlaw.com; kruzer@birnbaumgodkin.com; godkin@birnbaumgodkin.com; Jack Russo <jrusso@computerlaw.com>; Chris Sargent <csargent@computerlaw.com>; James Murphy <JMurphy@MPBF.com>; James Lassart <JLassart@MPBF.com>; Thomas Mazzucco <TMazzucco@MPBF.com>; Joseph Leveroni <JLeveroni@MPBF.com>; ECF Notices <ecf@computerlaw.com>
Cc: SERVICE-SIX4THREE <SERVICE-SIX4THREE@durietangri.com>
Subject: SERVICE: Six4Three, LLC v. Facebook, Inc. et al. CIV 533328

Dear Counsel,

Pursuant to Cal. R. Ct., rule 3.1312, and the Court's direction at the July 19, 2019 case management conference, we attach a proposed order. Within five days, please notify us whether you approve the proposed order, or state any reasons for disapproval.

Cat Kim | Durie Tangri LLP | ckim@durietangri.com | 415-376-6434

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
ZACHARY G. F. ABRAHAMSON (SBN 310951)
zabrahamson@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23**

**[PROPOSED] ORDER CONTINUING CASE
MANAGEMENT CONFERENCE,
CONTINUING HEARINGS ON MOTIONS TO
SEAL, AND SETTING BRIEFING
SCHEDULE ON RELATED MATTERS**

Date: July 19, 2019
Time: 2:00 p.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

1 The continued case management conference and hearings on Motions to Seal were held
2 concurrently on July 19, 2019, before this Department. Reno F.R. Fernandez III of Macdonald
3 Fernandez LLP appeared for Plaintiff Six4Three, LLC; Sonal N. Mehta and Josh Lerner of Durie Tangri
4 appeared for Defendant Facebook, Inc.; Jack Russo of Entrepreneur Law Group, LLP appeared for
5 Theodore Kramer and Thomas Scaramellino; and James Murphy of Murphy Pearson Bradley & Feeney
6 appeared for non-party Birnbaum Godkin LLP. Having heard the arguments and representations of
7 counsel, and good cause appearing,

8 **IT IS HEREBY ORDERED THAT:**

9 1. A further case management conference is set for August 7, 2019, at 9:00 a.m. before this
10 Department. Whether the scope of representation of Plaintiff's counsel satisfies previous orders of the
11 Court shall be considered at the case management conference.

12 2. The hearings on the Motions to Seal are continued to August 7, 2019, at 9:00 a.m. before
13 this Department.

14 3. The parties shall brief a motion regarding the court's power to allow discovery into the
15 disclosure of Facebook's Confidential and Highly Confidential information, and the proposed timing and
16 sequence of potential requests for relief by Facebook. All documents shall be filed and electronically
17 served, with courtesy copies hand-delivered to the Court on the day of filing.

18 a. Facebook's motion is due on July 24, 2019 at 5 p.m.

19 b. Six4Three's opposition is due on July 31, 2019 at 5 p.m.

20 c. Facebook's reply is due on August 2, 2019 at 5 p.m.

21 **IT IS SO ORDERED.**

22 Dated: _____

23 HON. V. RAYMOND SWOPE
24 SUPERIOR COURT JUDGE
25
26
27
28

PROOF OF SERVICE

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On August 6, 2019, I served the following documents in the manner described below:

[PROPOSED] ORDER RE: SIX4THREE, LLC'S RETENTION OF COUNSEL AND SETTING CASE MANAGEMENT CONFERENCE

- ☒ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California.
- ☐ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.
- ☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.
- ☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.
- ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from insert@durietangri.com to the email addresses set forth below.
- ☐ (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.

On the following part(ies) in this action:

VIA U.S. MAIL & EMAIL

Reno F.R. Fernandez III
Matthew J. Olson
Macdonald Fernandez LLP
221 Sansome Street, Third Floor
San Francisco, CA 94104
Reno@MacFern.com
Matt@MacFern.com

Attorneys for Plaintiff Six4Three, LLC

VIA EMAIL ONLY

Stuart G. Gross

VIA EMAIL ONLY

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com

Attorney for Theodore Kramer and Thomas Scaramellino (individual capacities)

1 GROSS & KLEIN LLP
2 The Embarcadero, Pier 9, Suite 100
3 San Francisco, CA 94111
4 sgross@grosskleinlaw.com

5 **VIA EMAIL ONLY**

6 David S. Godkin
7 James Kruzer
8 BIRNBAUM & GODKIN, LLP
9 280 Summer Street
10 Boston, MA 02210
11 godkin@birnbaumgodkin.com
12 kruzer@birnbaumgodkin.com

VIA EMAIL ONLY

James A. Murphy
James A. Lassart
Thomas P Mazzucco
Joseph Leveroni
Murphy Pearson Bradley & Feeney
88 Kearny St, 10th Floor
San Francisco, CA 94108
JMurphy@MPBF.com
jlassart@mpbf.com
TMazzucco@MPBF.com
JLeveroni@MPBF.com

Attorney for Birnbaum & Godkin, LLP

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 6, 2019, at San Francisco, California.

EXHIBIT 13

ATTORNEY OR PARTY WITHOUT ATTORNEY NAME: Reno F.R. Fernandez III (CA SBN 251934); Matthew J. Olson (CA SBN 265908) FIRM NAME: MACDONALD FERNANDEZ LLP STREET ADDRESS: 221 Sansome Street, Third Floor CITY: San Francisco TELEPHONE NO.: (415) 362-0449 E-MAIL ADDRESS: reno@macfern.com; matt@macfern.com ATTORNEY FOR (name): Specially Appearing for Plaintiff Six4Three, LLC		STATE BAR NUMBER: STATE: CA ZIP CODE: 94104 FAX NO.: (415) 394-5544		FOR COURT USE ONLY Electronically FILED by Superior Court of California, County of San Mateo ON 7/2/2019 By <u>/s/ Marcela Enriquez</u> Deputy Clerk	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO STREET ADDRESS: 400 County Center MAILING ADDRESS: 400 County Center CITY AND ZIP CODE: Redwood City, California 94063 BRANCH NAME: Southern Branch (Complex Civil Litigation)				CASE NUMBER: CIV533328	
PLAINTIFF: Six4Three, LLC, a Delaware limited liability company DEFENDANT: Facebook, Inc., a Delaware corporation; et al. OTHER:				JUDGE: Hon. V. Raymond Swope DEPT.: 23	
NOTICE OF LIMITED SCOPE REPRESENTATION <input type="checkbox"/> Amended					

[Note: This form is for use in civil cases other than family law. For family law cases, use form FL-950.]

1. Attorney (name): Macdonald Fernandez LLP
 and party (name): Six4Three, LLC
 who is the ☒ petitioner/plaintiff ☐ respondent/defendant ☐ other (describe):
 have an agreement that the attorney will provide limited scope representation in this case to the party.

2. The attorney will represent the party

- a. ☐ at the hearing on (date):
☐ and at any continuance of that hearing
☐ until submission of the order after hearing

- b. ☐ at the trial on (date):
☐ and at any continuance of that trial
☐ until judgment

- c. ☒ other (specify nature and duration of representation):

We will defend a motion for sanctions if brought by the defendants as contemplated in their recent case management conference statement, and we will appear at the case management conference set for July 19, 2019, if it goes forward.

This engagement is strictly limited. If we agree to perform any other or further work, this notice will be amended.

3. By signing this form, the party agrees to sign *Substitution of Attorney—Civil* (form MC-050) at the completion of the representation described above.

PLAINTIFF: Six4Three, LLC, a Delaware limited liability company DEFENDANT: Facebook, Inc., a Delaware corporation; et al. OTHER:	CASE NUMBER: CIV533328
--	---------------------------

4. During the limited scope representation, parties and the court must serve papers on both the attorney named above and directly on the party. (Cal. Rules of Court, rule 3.36.) The party's name and address for purpose of service are as follows:

Name: Six4Three, LLC

Address (for the purpose of service):

Attn: Theodore Kramer

1267 Chestnut Street, #6

San Francisco, CA 94109

Telephone:

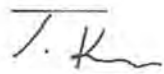
Fax:

This notice accurately states all current matters and issues on which the attorney has agreed to serve as an attorney for the party in this case. The information provided on this form is not intended to state all of the terms and conditions of the agreement between the party and the attorney for limited scope representation.

Date: July 2, 2019

Six4Three, LLC, Plaintiff


(TYPE OR PRINT NAME OF PARTY)


 (SIGNATURE OF PARTY)

Date: July 2, 2019

Reno F.R. Fernandez III, Partner

(TYPE OR PRINT NAME OF ATTORNEY)


 (SIGNATURE OF ATTORNEY)

PLAINTIFF: Six4Three, LLC, a Delaware limited liability company
 DEFENDANT: Facebook, Inc., a Delaware corporation; et al.
 OTHER:

CASE NUMBER
 CIV533328

PROOF OF SERVICE BY FIRST-CLASS MAIL

1. I am at least 18 years old and **not a party to this action**. I am a resident of or employed in the county where the mailing took place, and my residence or business address is (*specify*):
 221 Sansome Street, Third Floor
 San Francisco, CA 94104
2. I served copies of the *Notice of Limited Scope Representation* (form CIV-150) by enclosing each of them in a sealed envelope with first-class postage fully prepaid and (*check one*):
 - a. ☐ deposited the sealed envelopes with the United States Postal Service.
 - b. ☒ placed the sealed envelopes for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.
3. Copies of the *Notice of Limited Scope Representation* (form CIV-150) were mailed:
 - a. on (*date*): July 2, 2019
 - b. from (*city and state*): San Francisco, California
4. The envelopes were addressed and mailed as follows:

<ol style="list-style-type: none"> a. Name of person served: David Godkin, James Kruzer, Biarbaum & Godkin, LLP Street address: 280 Summer Street City: Boston State and zip code: MA 02210 b. Name of person served: Jack Russo, Christopher Sargent, Computerlaw Group Street address: 401 Florence Street City: Palo Alto State and zip code: CA 94301 	<ol style="list-style-type: none"> c. Name of person served: Donald P. Sullivan; Wilson Elser Street address: 525 Market Street, 17th Floor City: San Francisco State and zip code: CA 94105 d. Name of person served: Steven J. Bolotin; Morrison Mahoney LLP Street address: 250 Summer Street City: Boston State and zip code: MA 02210
---	--

☒ Names and addresses of additional persons served are attached. (*You may use form POS-030(P).*)

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date: July 2, 2019

Samantha Brown

(TYPE OR PRINT NAME OF DECLARANT)


 (SIGNATURE OF DECLARANT)

SHORT TITLE: Six4Three, LLC, a Delaware limited liability company v.
Facebook, Inc., a Delaware corporation; et al.

CASE NUMBER:
CIV533328

ATTACHMENT TO PROOF OF SERVICE BY FIRST-CLASS MAIL—CIVIL (PERSONS SERVED)

(This Attachment is for use with form POS-030)

NAME AND ADDRESS OF EACH PERSON SERVED BY MAIL:

Name of Person Served

Address (number, street, city, and zip code)

Sonal Mehta, Joshua Lerner, Laura Miller, Catherine Kim; Durie Tangri LLP	217 Leidesdorff Street, San Francisco, CA 94111
Stuart Gross, Esq., Benjamin Klein, Esq.; Gross & Klein LLP	The Embarcadero, Pier 9, Suite 100, San Francisco, CA 94111
Thomas Mazzucco, Joseph Leveroni; Murphy Pearson Bradley & Feeney	88 Kearny Street, 10th Floor, San Francisco, CA 94108

EXHIBIT 14

INTRODUCTION

Six4Three's theories, claims, and arguments have shifted endlessly, but its strategy has remained consistent: To extract a settlement from Facebook and several current and former executives (the "Individual Defendants") by using insubstantial claims as a vehicle for harassment. On their face, these claims are designed to impose liability on Facebook for protecting its users' privacy by limiting who can see and use their photos and other information. Six4Three has avoided litigating the merits of its claims, instead using the litigation process to generate media attention, publicize spurious misconduct allegations, and leak Facebook's confidential documents that were produced under seal, in violation of multiple court orders. Indeed, in ongoing proceedings below Six4Three now faces contempt charges and additional sanctions for repeatedly leaking Facebook's confidential material.

This strategy of sidestepping substance in favor of media-oriented mudslinging is precisely what triggered the order challenged in this appeal. Instead of responding to the Individual Defendants' arguments, Six4Three submitted a filing that incorporated four entire briefs by reference. It did so to free up space for nearly 15 pages of new, irrelevant and baseless factual allegations designed to drum up media interest in the case. Six4Three also attached as exhibits thousands of pages of Facebook's Confidential and Highly Confidential documents. Six4Three then funneled those documents to media outlets, in violation of numerous court orders.

Six4Three now maintains that the Superior Court's finding of waiver was an abuse of discretion—that the court was compelled to sift through the briefs improperly incorporated by reference, as well as the thousands of pages of exhibits, to find any arguments or evidence that might have some bearing on the Individual Defendants' motion. Six4Three's arguments are meritless.

EXHIBIT 15



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NEWS



Uploaded: Tue, Dec 4, 2018, 3:32 pm

Facebook's international drama has its day in county court

by Kate Bradshaw / Almanac

A years-old lawsuit in San Mateo County has made international headlines in recent days after a man who started a company that is now suing Facebook handed a committee of British lawmakers an unknown number and selection of highly confidential Facebook documents that, under court order, were strictly limited for access by his attorneys.

San Mateo County Superior Court Judge Raymond Swope, who had issued a court order that the documents be sealed, called together the legal counsels for Facebook and Six4Three the afternoon of Friday, Nov. 30, to find an answer to that very question: Why and how had his court order been violated?

"When I issue a valid court order governing the conduct of parties in this case -- or any other such court order -- I expect these to be followed," he said during the court proceedings. "I do not expect a compromise of the integrity of this judicial system."

The breach

On Nov. 26, Ted Kramer, founder of a company called Six4Three that is suing Facebook, was ordered, while in London, to hand over the confidential documents to the Digital, Culture, Media and Sport Committee of the U.K. House of Commons.

Kramer's company had, during Facebook's heyday of looser restrictions regarding user data, developed an application, called "Pikinis," that enabled Facebook users to search friends' photos that depict people wearing swimwear. The application shuttered after Facebook clamped down on the user data it permitted third-party app developers to use.

In April 2015, Six4Three filed a lawsuit against Facebook; the suit has been working through the county court system ever since. As part of the discovery process, the attorneys representing Six4Three had been granted access to confidential Facebook documents.



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However, Kramer, as a plaintiff, was not supposed to have access to them. But he somehow gained access, and so was able to deliver Facebook's confidential documents to Parliament, which he handed over on a thumb drive. Just what was on that thumb drive was a key concern of both Swope and Facebook's legal team, and was not known by those parties at the time of Friday's hearing.

The seizure of the documents occurred in advance of a Nov. 27 international grand jury [hearing](#) on fake news and disinformation; the panel had invited CEO Mark Zuckerberg to the hearing, but he declined to attend.

According to the newspaper [The Observer](#), the set of documents released is alleged to contain "significant revelations about Facebook decisions on data and privacy controls that led to the Cambridge Analytica scandal, which involves suspected Russian involvement in the 2016 U.S. presidential election. It is claimed they include confidential emails between senior executives, and correspondence with Zuckerberg."

How it happened

So how did Kramer get access to the confidential documents? The only people who could have granted him access were his attorneys, Swope said.

During the hearing, Swope vigorously questioned two of Kramer's attorneys, Stuart Gross of Gross & Klein, and David Godkin of Birnbaum & Godkin. Both mentioned a third member of Six4Three's legal team, Thomas Scaramellino, who was also a former investor in the company. He was not present, but they said he may have played a role in granting Kramer access to the files through a company Dropbox account that may have had "syncing" features they were unaware of.

After the files were delivered to Parliament, some of the confidential Facebook files in the Dropbox account had been marked for deletion, but hadn't yet been deleted, according to Gross, who said he viewed the contents of the Dropbox account after learning of the document delivery but didn't make any changes.

A sense of urgency

The potentially imminent deletion of those files created a sense of urgency in the courtroom. Facebook attorney Joshua Lerner expressed concern about the contents of the thumb drive in Parliament and urged the judge to order that the court take immediate steps to find out what was handed over. He asked that a third-party computer forensics expert be deployed immediately to capture any evidence that might be available on the laptops of Kramer and Scaramellino.

"We don't know what exists, who has access to it, (or) who else, perhaps, by the way, is traveling around with this stuff. It needs to be handled now," he said.

"The whole system of discovery breaks down if lawyers can't be trusted with confidential information," said Facebook attorney Sonal Mehta. (Discovery is the part of the legal process whereby lawyers can request documents and evidence from the other party or parties in a lawsuit.)


Swope ultimately ordered that Kramer's laptop and phone, any storage devices, including cloud storage details and all relevant passwords, be handed over by 9 p.m. that night and Scaramellino's laptop, storage devices and cloud storage details and passwords be handed over by noon the following day, as he was in New York. They were to be evaluated by an agent from Stroz Friedberg, a third-party forensics firm, to capture the evidence.

A discovery conference has been scheduled for Friday, Dec. 7.

Follow the Palo Alto Weekly/Palo Alto Online on Twitter [@PaloAltoWeekly](#) and [Facebook](#) for

breaking news, local events, photos, videos and more.

Kate Bradshaw writes for The Almanac, the sister publication of PaloAltoOnline.com.



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Sorry, but further commenting on this topic has been closed.

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		TheSixFifty.com	

EXHIBIT 16



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BRIEFING • FACEBOOK

Six4Three Exec Ordered to Surrender Laptop After Facebook Leak

By [Bloomberg](#)
December 1, 2018

[Facebook](#)
[Twitter](#)
[Linkedin](#)

The co-founder of a software company was ordered by a judge to surrender his laptop to a forensic expert after admitting he turned over confidential documents about Facebook Inc. to the U.K. Parliament in violation of a U.S. court order.

Sensitive internal Facebook records that were supposed to remain sealed in a California lawsuit were leaked to a parliamentary committee by one of the founders of app Six4Three, which sued Facebook three years ago over access to friends' data.

A judge in state court in Redwood City, California, stopped short of holding the company in contempt, as Facebook requested, but said after a hearing Friday that he may issue a contempt order and sanctions at a later date.

“What has happened here is unconscionable,” California Superior Court Judge V. Raymond Swope said to Six4Three co-founder Ted Kramer and his attorneys during the hearing. “Your conduct is not well-taken by this court. It’s one thing to serve other needs that are outside the scope of this lawsuit. But you don’t serve those needs, or satisfy those curiosities, when there’s a court order preventing you to do so.”

Facebook wants the laptop to be evaluated to determine what happened in the U.K., to what extent the court order was breached and how much of its confidential information has been divulged to the committee.

Kramer has admitted to traveling to London where he claims he was pressured to hand over the information to Damian Collins, who heads Parliament’s Digital, Culture, Media and Sport Select Committee.

At a hearing in London on Nov. 27, Collins cited an internal email retrieved from Kramer as part of the committee’s investigation into the impact of fake news. Richard Allan, vice president of policy solutions at Facebook, said he wouldn’t discuss the documents because of the court order.

Collins, who has said he’s free under U.K. law to release the internal records, said the committee hoped to publish them in the coming week.

Facebook accused Kramer’s attorneys of complicity in the release, arguing that Kramer could only have access to the sealed files in a Dropbox account if attorneys gave it to him.

A third-party forensics team will pick up Kramer’s laptop, along with his attorneys’ computers, on Friday night. He didn’t bring it to court.

“He can voluntarily carry it to Parliament, but when your honor schedules a hearing the computer isn’t here?” said

Joshua Lerner, an attorney for Facebook.

Thomas Scaramellino, a member of Kramer's legal team and a third-party consultant, has also been ordered to turn over his laptop but his whereabouts were unknown Friday.

Kramer's attorneys informed the judge that they could no longer represent Kramer, who they said violated the court order without consulting his legal counsel. Swope ordered the attorneys to remain part of Kramer's legal team until the matter is resolved.

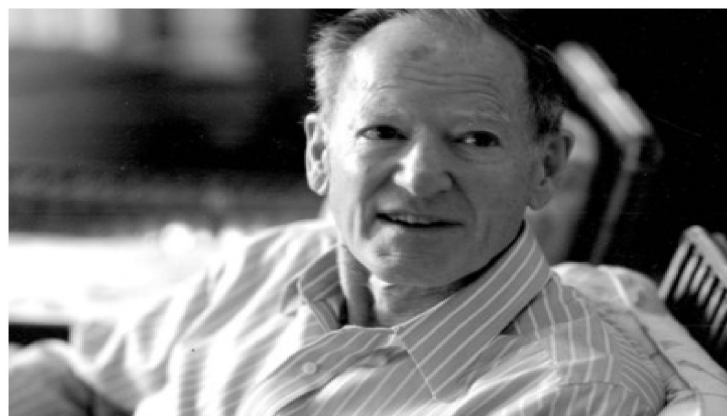
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US judge seizes laptop used to pass Facebook's confidential documents to British MPs



A demonstrator outside Portcullis House on the day of Parliament's fake news hearing last week CREDIT: DANIEL LEAL-OLIVAS/AFP

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By **Laurence Dodd**s, US TECHNOLOGY REPORTER, REDWOOD CITY

1 DECEMBER 2018 • 3:03PM

A judge in Silicon Valley has ordered the confiscation of laptops, emails and mobile phones that may have been used to leak secret Facebook documents to British MPs last week.

Judge V. Raymond Swope of the Superior Court of California ordered Ted Kramer, an American app maker who is at the centre of a stand-off between Facebook and Parliament, to hand over his devices to forensic investigators late on Friday night.

His ruling may shed new light on how damaging internal emails between Facebook staff were given to a Parliamentary committee in defiance of a US court order

(<https://www.telegraph.co.uk/technology/2018/11/25/facebook-documents-seized-mps-using-rare-parliamentary-mechanism/>).

It concluded a bruising hearing in which lawyers acting for Facebook "aggressively" sought to control the extent of the leak and seemingly penalise Mr Kramer and his lawyers for their alleged part in it.

"Facebook's highest priority at this point is to determine the extent of the violation of the court's orders and the extent of the dissemination," said Sonal Mehta, counsel for Facebook, adding that the company needed to determine "which confidential information remains at risk of improper disclosure".

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The emails have already been used by Damian Collins, head of the House of Common's Digital, Culture, Media and Sport select committee, to grill Facebook about how early it knew about abuses of its system by Russian agents.



Mark Zuckerberg's empty chair at the Parliamentary committee hearing on November 27 CREDIT: GABRIEL SAINHAS/HOUSE OF COMMONS/AP

Other documents from the same legal case revealed that Facebook briefly considered selling its users' personal data to other companies

(<https://www.telegraph.co.uk/technology/2018/11/29/facebooks-plans-sell-user-data-revealed-email/>), something Mark Zuckerberg has promised never to do.

It is unclear what else might be contained among the hundreds of pages of documents created by the lawsuit, most of which remain under a court seal, but they are believed to contain internal discussions between senior Facebook executives, including Mark Zuckerberg, about its business model.

Mr Collins, who has repeatedly attempted to bring Mr Zuckerberg before his committee without success, pledged on Tuesday to publish the documents soon, but said some of them might be redacted.

And on Friday, in a courtroom in Redwood City, California, his use of a rare Parliamentary mechanism to seize the documents sent new ripples through a long-running dispute between Facebook and Six4Three, an app company founded by Mr Kramer.

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Six4Three, the creator of a now-defunct app allowing Facebook users to find pictures of their friends wearing swimsuits, is suing the social network for unfairly "destroying" its business when it cracked down on third-party access to its data in 2015.

Mr Kramer contends that he was dragooned into handing over the documents during a business trip to London, saying that he "panicked" when Mr Collins told him that he was in

contempt of Parliament and could face prison.

But Facebook alleges that he deliberately engineered a situation in which he could leak the documents (<https://www.telegraph.co.uk/technology/2018/11/29/facebook-accuses-us-app-developer-deliberately-leaking-private/>) while claiming to be under duress, asking why he took the documents with him to Mr Collins' office on his laptop and why he never consulted a British lawyer.

In Friday's hearing, Facebook's legal team went further, suggesting that their opposing counsel might have requested the disclosure of documents not relevant to their lawsuit with the covert aim of one day making them public in order to make a "tactical gain".

Zuckerberg: "it was my mistake and I'm sorry"

"[They] created a declaration with hundreds of pages of exhibits, many of which... had nothing to do with this case," said Joshua Lerner, counsel for Facebook. "And lo and behold, it all gets disclosed when [Mr Kramer] decides to walk over to Parliament."

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Judge Swope did not rule on that claim, but sternly berated Mr Kramer for not bringing the laptop to court, exclaiming: "It was available to the House of Commons DCMS [committee], but not to me. And there's no excuse."

Under intense questioning, Six4Three's lawyers admitted that Mr Kramer should never have had access to the documents, which were stored on a Dropbox account of which he was the administrator.

"What happened is unconscionable," Judge Swope told David Godkin, one of the lawyers. "It shocks the conscience, and your conduct is not taken well by this court... the ends do not justify the means, whatever you're trying to accomplish."

Mr Godkin said that his firm had acted in good faith and had been blindsided by Mr Kramer's actions, also revealing that he was withdrawing his counsel from Mr Kramer, having concluded he could no longer ethically represent him.

But he also protested against Facebook's "aggressive" tactics, which included asking the judge to order that investigators be given access to Mr Godkin's own computer.

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Mr Lerner argued that this was necessary to ensure that high-profile corporate clients such as Facebook were not dissuaded from disclosing documents by the fear that "honest discussions among themselves" would be made public.

I have looked long and hard for a case like this and I can't find one," he said. "As a result of what's happened here, lawyers can never say that people don't go out and produce hundreds of documents for foreign governments."

The court will now attempt to understand how Mr Kramer gained access to the documents whether Six4Three's lawyers played any part in their transmission.

In his ruling, Judge Swope called Facebook's statement of the facts "compelling" but asked it to make the same claims in a sworn affidavit.

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California judge condemns startup for giving secret Facebook papers to UK

Parliament seized confidential documents under scrutiny in Six4Three’s lawsuit against social network



Six4Three sued Facebook in 2015, accusing it of anti-competitive practices. The confidential documents emerged as part of the case. Photograph: Jeff Chiu/AP

Julia Carrie Wong and Sam Levin in Redwood City, California

Sat 1 Dec 2018
02.47 GMT



A **California** judge sharply criticized the legal team of the app developer that turned over confidential Facebook documents to the British parliament, accusing the attorneys of behavior that “shocks the conscience” and ordering them to hand over their client’s laptops and other evidence.

In a suburban courtroom in Silicon Valley – far from the jurisdiction of Westminster – Judge V Raymond Swope attempted to deal with the legal fallout from an extraordinary **maneuver by the UK parliament**, which last week seized highly confidential internal Facebook documents from Ted Kramer, founder of Six4Three, a former startup.

How Kramer, who has been pursuing a protracted legal battle against Facebook, came to provide those documents to Damian Collins, chair of the parliamentary **committee that has been investigating Facebook** over fake news, was under dispute as Facebook and Six4Three’s attorneys squared off Friday afternoon.



Parliament seizes
cache of Facebook
internal papers

Read

“What has happened is unconscionable,” Swope said from the bench. “It shocks the conscience. And your conduct is not well taken by this court.”

Swope ordered Kramer to hand over his laptop, cellphone and passwords to a forensic investigator and ordered Thomas Scaramellino, a member of the Six4Three legal team who was also an investor in the company, to provide his devices for document preservation.

The documents given to parliament were produced as part of a lawsuit filed by Six4Three over allegations of **anti-competitive practices** by Facebook. Six4Three created a controversial Facebook app called Pikinis that allowed users to filter photos to find images with people in bikinis and other swimwear.

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The lawsuit, filed in 2015, alleged that Facebook encouraged developers to create

platforms within its system by implying they would have long-term access to personal user data and then later removed this access. [Facebook](#) has been fighting for months to prevent the release of internal documents related to the case.

Collins invoked a rare parliamentary power compelling Kramer to turn over the documents while the American was in London earlier this month.

According to a court filing by Kramer's attorneys, the Six4Three executive initially sought to comply with the US judge's seal, but "panicked" after he was told that he was in "contempt of Parliament" and could be fined or imprisoned. At that point, Kramer allegedly provided Collins' staff with a USB drive containing documents that he claimed were accidentally left in a Dropbox folder on his computer.

Facebook's attorneys expressed disbelief at Kramer's version of events, pointing out Kramer had been in communication with Collins and his committee prior to travelling to the UK.

"After coordinating for weeks with the DCMS committee, Mr Kramer traveled to the United Kingdom with documents he never should have had in the first place on his laptop for some unspecified business and checked into a hotel 1500ft away from parliament," said Sonal Mehta, an attorney for Facebook. "He voluntarily went the 1500ft to parliament, showed up unannounced, and asked to see a member of parliament. He brought with him the confidential documents on his laptop and a thumb drive."

Though Swope offered no opinion as to parliament's action, he appeared furious that Kramer and his attorney had failed to bring the laptop in question to court Friday.

"It was available to the House of Commons DCMS, but not to me," Swope said. "And there is no excuse to have a laptop available to a subcommittee of the House of Commons inquiring into matters that are not within the four corners of this lawsuit, but not when you have a hearing in this court at two o'clock."

Collins has said that he intends to release the documents to the public after he redacts personally identifying information.

Swope repeatedly admonished Six4Three and its legal team, questioning why Kramer had access to the records. The documents were provided to Six4Three's lawyers during discovery, but should not have been shared with Kramer, according to the judge's protective order.

"When I issue a valid court order governing the conduct of parties in this case or any such court order, I expect these orders to be followed. I do not expect a compromise of the integrity of this judicial system, which has been done," he said. "The ends do not justify the means, whatever you're trying to accomplish."

Josh Lerner, an attorney for Facebook, said the disclosure of sealed documents in this manner was unprecedented and merited serious consequences.

"People don't go out and produce hundreds of documents to foreign governments," he said. "As a result of what happened here, lawyers can no longer say it's never happened."

Six4Three's attorneys also indicated that they intended to withdraw as counsel, though the judge ordered them to remain in the case until the matter of the disclosure of records was resolved.

"We have ethical issues that are going to preclude us from remaining in this case," said David Godkin. "This whole situation has created serious issues for us under the rules of professional responsibility."

Godkin alleged that the legal team only recently learned that Kramer had access to the documents, but added: "My firm obviously has to take responsibility for failing to adequately prevent that from happening and we do."



Take Zuckerberg's name off our city's hospital, says San Francisco politician

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Kramer said little at the hearing. His new attorney, hired Thursday, said he was working with an international firm to review British law and any ways they could attempt to retrieve the documents handed to parliament.

The original complaint [alleged](#) that Mark Zuckerberg created a "malicious and fraudulent scheme" to force rival firms out of business and exploit users' personal data.

One key allegation is that Facebook to maintain access to user data in exchange for increased spending on Facebook ads. The [Wall Street Journal](#) reported Wednesday that some other redacted papers appeared to support that allegation.

Six4Three lawyers have also raised questions about Facebook's exploitation of user privacy, citing the [Cambridge Analytica scandal](#).

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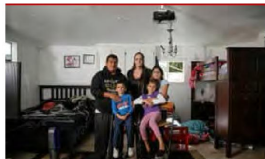
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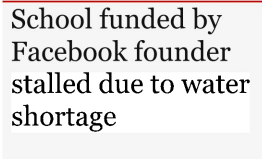
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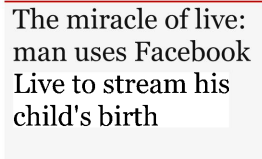
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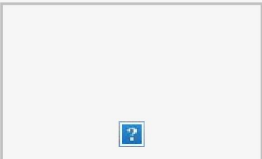


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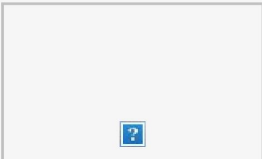
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EXHIBIT 19

DISLIKE —

Judge slams bikini-app maker's lawyers in legal clash with Facebook

"What has happened is unconscionable," judge tells Six4Three's Ted Kramer.

CYRUS FARIVAR - 12/1/2018, 9:35 AM



Getty Images | Iain Masterton

[Enlarge](#)

At the conclusion of a tense hearing that lasted over 3.5 hours, a San Mateo County judge ruled Friday that a top executive of an embattled and now-defunct bikini-related app company now must surrender his electronic devices for forensic inspection.



FURTHER READING

Facebook pondered, for a time, selling access to user data

San Mateo County Judge V. Raymond Swope ordered Six4Three's managing director, Ted Kramer, to hand over his computer and mobile devices by 9pm PT on Friday evening.

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The two orders came 10 days after the revelation that Kramer strangely shared a number of files that had previously been kept secret in an ongoing lawsuit that dates back years.

In 2015, Six4Three sued Facebook in San Mateo County Superior Court. The company alleged "fraudulent and anti-competitive schemes" in relation to changes made by Facebook in 2014 to the way that access to its Graph API worked. Those changes quickly ended Six4Three's business model on its short-lived "Pikinis" app, which was designed to identify photos of bikini-clad Facebook users. The case remains set for an April 25, 2019, trial date in the county court in Redwood City, California, roughly five miles north from Facebook's headquarters in Menlo Park.

The lawsuit gained new life last month when Kramer was confronted by Damian Collins, a British member of parliament currently leading an investigation into Facebook. The MP demanded that Kramer hand over certain documents obtained during the course of the lawsuit.

However, those documents were already under protective order by the San Mateo court. Nevertheless, Kramer, according to his lawyer's testimony, "panicked:" on November 20, Kramer handed over a USB stick with some materials to Collins, who has vowed to publish them soon.

**FURTHER READING**

Six4Three exec "panicked" in UK MP's office, gave up Facebook internal files

"What has happened is unconscionable," Judge Swope said from the bench, addressing Kramer, according to *The Guardian*. "It shocks the conscience. And your conduct is not well taken by this court."

The judge slammed Kramer's lawyers, expressing amazement that not only had Kramer been improperly given access to the files due to an apparently misconfigured Dropbox app, but that he handed over the files to British authorities seemingly without his lawyers' knowledge or approval.

"When I issue a valid court order governing the conduct of parties in this case or any such court order, I expect these orders to be followed. I do not expect a compromise of the integrity of this judicial system, which has been done," Judge Swope said. "The ends do not justify the means, whatever you're trying to accomplish."

David Godkin, another one of Six4Three's lawyers, said that he and the other company lawyers would be withdrawing from the case.

Godkin's redaction failures in a February 2017 court document also recently revealed that Facebook had once considered charging access to its Graph API—a fact that Facebook had wished to keep secret.

"This whole situation has created serious issues for us under the rules of professional responsibility," he said.

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If you look at the court's order and then at the letter (Appendix A), you can get a slightly clearer picture of what's going on.

The first issue, and really the major issue, is that Kramer shouldn't have had access to the materials he shared in the first place.

The second issue is why he travelled to London with them...he spoke to members of the parliamentary committee before traveling to London, so it's not like he was blindsided by their request for the documents. On the contrary, he may have been counting on it.

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Cyrus is a Senior Tech Policy Reporter at Ars Technica, and is also a radio producer and author. His latest book, *Habeas Data*, about the legal cases over the last 50 years that have had an outsized impact on surveillance and privacy law in America, is out now from Melville House. He is based in Oakland, California.

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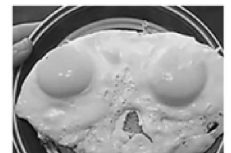
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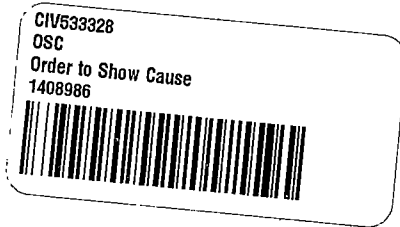
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

SIX4THREE LLC,

Plaintiff,

vs.

FACEBOOK INC., et al.

Defendants.

Case No. CIV533328

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Dept.: 23

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Counsel for Plaintiff SIX4THREE, LLC ("Plaintiff"), Stuart G. Gross (#251019) and Benjamin H. Klein (#313922) of Gross & Klein LLP and of counsel David S. Godkin (admitted *pro hac vice*) and James E. Kruzer (admitted *pro hac vice*) of Birnbaum & Godkin, LLP (collectively "Plaintiffs' counsel") are hereby given notice that, on November 2, 2018 at 9 a.m. in Department 23, which is located at 400 County Center, Redwood City, California or as soon thereafter as the matter may be heard, the hearing on an order to show cause why Plaintiffs' counsel are not liable for sanctions and have not violated Code of Civil Procedure, section 128.7, subdivision (b), unless, within 21 days of service of this Order to Show Cause ("OSC"), the challenged papers are withdrawn or corrected. (Code Civ. Proc. § 128.7, subd. (c)(2).)

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1. On November 29, 2017 at 8:50 a.m., Mr. Godkin emailed the court and all other counsel requesting "an immediate ruling regarding depositions noticed for the next week in this case."

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2. On November 29 at 10:48 a.m., the Court instructed "[t]he parties to appear ex parte tomorrow (11/3) at 2 pm in Dept. 2" and to "please provide a dial-in number for the Court and the parties to participate by teleconference at 2 pm."

1 3. On November 29 at 11:04 a.m., Mr. Godkin replied and provided a dial in number for the
2 teleconference.

3 4. On November 29 at 6:44 p.m., counsel for defendant Facebook, Inc. ("Defendant") asked
4 whether "the Court [would] prefer an in-person hearing, with counsel outside of California
5 participating by teleconference."

6 5. On November 30 at 6:18 a.m., Mr. Godkin responded, "[C]ounsel for Plaintiff will appear
7 by telephone."

8 6. On November 30 at 7:25 a.m., the Court requested all parties appear by teleconference.

9 7. On November 30, Plaintiff filed and served its Ex Parte Application to Allow Discovery.
10 On that same date, Defendant filed its opposition.

11 8. On November 30, the Court conducted the ex parte proceeding by teleconference and
12 denied Plaintiff's application.

13 9. On July 23, 2018, Defendant filed its Notice of Appeal. (See *Six4Three, LLC v. Facebook*
14 *Inc.* (First. App. Dist., case no. A154890).) On September 10, Plaintiff filed its cross-appeal. (See
15 *Six4Three, LLC v. Facebook Inc.* (First. App. Dist., case no. A155334).)

16 10. On September 26, Plaintiff filed and served its Ex Parte Application for Order Permitting
17 Plaintiff to File its Respondent's Notice Designating Record on Appeal ("Ex Parte"), where Plaintiff-
18 "Respondent's Designation identifies one additional hearing transcript, along with the two identified
19 by Defendant-Appellant Facebook, for inclusion in the appellate record." (Ehlert Dec. ISO Ex Parte,
20 filed Sept. 26, 2018, p. 2:1-2 ("Ehlert Dec.")). To her declaration, appellate attorney Allison Ehlert
21 "attaches a *certified copy* of that transcript so there will be no delay with preparing that transcript"
22 as Exhibit A to her declaration. (*Id.* at p. 2:3-4 (original emphasis).) Ms. Ehlert intends on using this
23 same transcript in Plaintiff's cross-appeal. (*Id.* at p.2:4-9.) Ehlert Declaration, Exhibit A designates
24 and includes a transcript of the ex parte proceeding conducted by teleconference on November 30,
25 2017 ("Transcript"). In the Transcript, Angela T. Kott (CSR #7811) titles the ex parte proceeding as
26 "Telephonic Reporter's Transcript of Proceedings" and certifies "that the foregoing proceedings
27 were taken in shorthand by me, at the time and place therein stated[, Thursday November 30, 2017,
28

1 2:01 P.M. – 2:36 P.M.,] and that the said proceedings were thereafter reduced to typewriting, by
2 computer, under my direction and supervision." (Transcript, p. 1:14-15, 18:4-8.)

3 11. Ex parte proceedings in actions designated complex in this Court are generally not
4 reported. At no point in the correspondence of Plaintiffs' counsel sent on November 29 and 30, 2017
5 or in the ex parte application, filed on November 30, did Plaintiff request the appointment of Ms.
6 Kott to perform the duties of a phonographic reporter pursuant to Government Code section 70044.
7 The Court has no record of receiving a request to appoint Ms. Kott for this ex parte proceeding. Nor
8 does the record reflect the Court making such an appointment. "A pro tempore official reporter for
9 such service may be appointed by . . . the judge presiding in the department where such reporter will
10 serve." (Gov. Code § 70044.) Further, the ex parte proceeding was a contested matter and the Court
11 has no record of receiving a written stipulation of the parties required by statute prior to the
12 appointment of Ms. Kott. (See Opp. to Ex Parte, filed Nov. 30, 2017.) "If such appointment is made
13 for service in a contested matter, it shall be made only pursuant to a written stipulation of the parties
14 appearing at the trial or hearing or other proceeding to be reported by such pro tempore reporter."
15 (Gov. Code § 70044.)

16 12. This Court has a general policy of providing official court reporters in civil matters.
17 (https://www.sanmateocourt.org/online_services/court_reporter_requests/jameson_v_desta.php.)
18 The Court has no record of Ms. Kott complying and satisfying all of the requirements necessary "to
19 serve [as a pro tem official reporter] in any matter [in San Mateo Superior Court] without further
20 order of the court or stipulation of the parties." (Gov. Code § 70044.)

21 13. Furthermore, according to the Transcript, when the research attorney asked, "Who do I
22 have on the line?" Mr. Godkin responded, "David Godkin and Jim Kruzer from Birnbaum & Godkin
23 on behalf of the Plaintiff." (Transcript, p. 1:3-6.) Mr. Godkin never informed the Court that Ms. Kott
24 was also on the line during the ex parte proceeding. Nor did Ms. Kott identify her presence on the
25 teleconference in response to the research attorney's question. (*Id.* at p. 1:3-11.)

26 14. Should this ex parte proceeding have been recorded by Plaintiffs' counsel through their
27 teleconference service or some other method and later transcribed by Ms. Kott, which would
28 contradict to her certification, "court proceedings may not be photographed, recorded, or broadcast"

1 without the court's permission. (Cal. Rules of Court, rule 1.150(c) & (d) (generally "Rule 1.150").)
2 " 'Recording' means the use of any analog or digital device to aurally or visually preserve court
3 proceedings. As used in this rule, recording does not include handwritten notes on the court record,
4 whether by court reporter or by digital or analog preservation." (Rule 1.150(b)(6).) The Court has
5 no record of receiving or granting a request to record this ex parte proceeding.

6 Pursuant to Code of Civil Procedure section 128.7, "there are basically three types of
7 submitted papers that warrant sanctions: factually frivolous (not well grounded in fact); legally
8 frivolous (not warranted by existing law or a good faith argument for the extension, modification,
9 or reversal of existing law); and papers interposed for an improper purpose." (*Guillemin v. Stein*
10 (2002) 104 Cal.App.4th 156, 167.)

11 In this instance, the use of shorthand reporter not appointed by the Court in a court
12 proceeding violates Government Code section 70044. The recording of a court proceeding without
13 the consent of the Court violates Rule 1.150 and "is an unlawful interference with the proceedings
14 of the court and may be the basis for an order terminating media coverage, a citation for contempt
15 of court, or an order imposing monetary or other sanctions as provided by law." (Rule 1.150(f).)

16 Based on the foregoing, the Ex Parte requesting an order permitting Plaintiff to file its
17 untimely Respondent's Notice Designating Record on Appeal (First App. Dist. case no. A154890),
18 including the designation and inclusion of a "certified" and unauthorized transcript of the November
19 30 ex parte proceeding is legally frivolous. (See Ehlert Dec., ¶ 7, Ex. A.)

20 Additionally, the designation and inclusion of this same transcript in Plaintiff-Appellant's
21 Notice of Designating Record on Appeal in its cross-appeal is legally frivolous. (Appellant's Notice
22 Designating Record on Appeal, filed Sep. 19, 2018. See also Ehlert Dec., ¶ 7, Ex. B.)

23 The Court hereby sets the matter for November 2, 2018 at 9 a.m. in Department 23 for
24 hearing on an order to show cause why Plaintiff's counsel Stuart G. Gross and Benjamin H. Klein
25 of Gross & Klein LLP and of counsel David S. Godkin and James E. Kruzer of Birnbaum & Godkin,
26 LLP, are not liable for sanctions and have not violated Code of Civil Procedure, section 128.7,
27 subdivision (b), unless, within 21 days of service of this OSC, the challenged papers are withdrawn
28 or corrected. (Code Civ. Proc. § 128.7, subd. (c)(2).)

1 Mr. Gross, Mr. Klein, Mr. Godkin and Mr. Kruzer shall personally appear at this hearing.

2 The Clerk is directed to serve electronically and by mail this OSC on Mr. Gross, Mr. Klein,
3 Mr. Godkin, Mr. Kruzer and all other parties in conformity with Code of Civil Procedure section
4 128.7, subdivision (c)(2). (See Stip. for Electronic Service of Documents and Notices, filed Jan. 12,
5 2017.)

6 IT IS SO ORDERED.

7
8 DATED: September 28, 2018

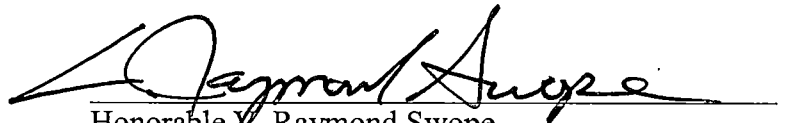
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11 Honorable V. Raymond Swope
12 Judge of the Superior Court
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EXHIBIT 21

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5. As discussed in Plaintiff's Record Designation Application, the court clerk never provided Plaintiff a notice of default, as required under CRC 8.130, and thus the Court's refusal to accept Plaintiff's designation notice was improper. Therefore, there was nothing frivolous about Plaintiff's request, contained in its Record Designation Application, that the Court issue an order allowing Plaintiff to file its designation notice.

Accordingly, no sanctions should be ordered against Plaintiff's counsel, and the Court should issue the order requested in Plaintiff's Record Designation Application.

FACTUAL BACKGROUND

On August 16, 2017, Facebook’s counsel requested permission from Judge Weiner to engage a private reporter. *See* Declaration of Joshua Lerner ISO Facebook’s OSC Response (“Lerner Decl.”), Ex. 1 at 89:24-90:9. This request was made on behalf of Facebook, not jointly by Facebook and Plaintiff, *see id.* at 89:24-92:12, on the grounds that “the reporter has a tremendous backlog,” which was preventing the timely provision of transcripts that were needed “especially in light of the writ that was taken,” *id.* at 90:4-7. Judge Weiner responded that she was “willing to try that,” *id.* at 91:18, and instructed the parties to meet and confer as to the specifics regarding such things as costs sharing, *id.* 91:19-21.

In advance of the next hearing, which was to occur on September 11, 2017, counsel for Facebook contacted counsel for Plaintiff to inquire whether Plaintiff would agree to split the cost of a private reporter for the September 11 hearing. Declaration of David Godkin ISO Plaintiff's Response to the OSC ("Godkin Decl."), ¶ 2, Ex. 1. Plaintiff agreed to do so. *Id.*

At the September 11, 2017 conference, Judge Weiner noted the presence of the private reporter, catalyzing the following colloquy between Judge Weiner and Facebook's counsel:

THE COURT: And someone brought a court reporter?

MR. LERNER: Yes, Your Honor. As we discussed the last time, the parties agreed to do that, understanding the burdens on the Court. We have the issues with appeals and whatnot, so we -- we're sharing costs on that and -- and have brought a reporter.

THE COURT: That's fine, as long as you know that our court reporter is still the official court reporter for the purposes of having the official record.

1 MR. LERNER: Understood, Your Honor.
2 Godkin Decl., ¶ 3, Ex. 2 at 5:3-15.

3 Facebook's counsel arranged for a private reporter to transcribe the November 30
4 hearing and provided the reporter with the call-in information for that hearing. Lerner Decl., Ex.
5 3. Plaintiff's counsel was not copied on the email from Facebook's counsel to the reporter, *see*
6 *id.*, and was not otherwise notified by Facebook's counsel that a private reporter had been
7 engaged to transcribe the hearing, Godkin Decl., ¶ 4. Accordingly, when the Court inquired, at
8 the start of the hearing, who was on the line, Mr. Godkin was not aware that there was a private
9 reporter on the line. *Id.* Facebook's counsel apparently was aware of that fact but did not
10 disclose that to the Court. Lerner Decl., Ex. 4, 3:7-10.

11 After the November 30 Hearing, Plaintiff's counsel received an email from Aptus Court
12 Reporters, notifying him that the hearing had been transcribed and that a transcript was
13 available. Godkin Decl., ¶ 6, Ex. 3. Plaintiff's counsel, thereafter, requested and received the
14 transcript from the Aptus reporter. *Id.*, ¶ 6.

15 On page 18 of the November 30 Hearing Transcript there appears a "CERTIFICATION
16 OF REPORTER" signed by Angela T. Kott, CSR #7811, which states that Ms. Kott "certif[ies]
17 that the foregoing proceedings were taken in shorthand by me, at the time and place therein
18 stated, and that the said proceedings were thereafter reduced to typewriting, by computer, under
19 my direction and supervision." Lerner Decl., Ex. 4 at 18:4-8.

20 On December 12, 2017, in its opposition to a motion to compel certain discovery,
21 Facebook submitted excerpts of the November 30 Hearing Transcript. *See id.*, Ex. 5, Ex. 1. In
22 support of its reply, Plaintiff also submitted excerpts of the November 30 Hearing Transcript.
23 *See id.*, Ex. 6, Ex. A. In a subsequent hearing, which occurred on January 9, 2018, the Court did
24 not voice any objection to either party's submission of the November 30 Hearing Transcript.
25 *See id.*, ¶ 9; Godkin Decl., ¶ 7.

26 **LEGAL STANDARD**

27 Sanctions can be imposed under CCP § 128.7 only if papers submitted by a party are:
28 "factually frivolous (not well grounded in fact); legally frivolous (not warranted by existing law

or a good faith argument for the extension, modification, or reversal of existing law); [or] . . . interposed for an improper purpose.” *Guillemín v. Stein* (2002) 104 Cal. App. 4th 156, 167; *see also San Diegans for Open Gov’t v. City of San Diego* (2016) 247 Cal. App. 4th 1306, 1318 (CCP § 287’s “scope is limited to the filing of frivolous pleadings”). This requires that the filing be “objectively unreasonable” in order for it to be sanctionable. *Guillemín, supra*, 104 Cal. App. 4th at p. 167 (quoting *In re Marriage of Reese & Guy* (1999), 73 Cal. App. 4th 1214, 1221.)

ARGUMENT

Plaintiff’s Record Designation Application was neither legally frivolous, factually frivolous, nor interposed for any improper purpose. The same is true as to Plaintiff’s designation of the November 30 Hearing Transcript in its own cross-appeal. Thus, no sanctions should be awarded against Plaintiff or its counsel.

I. Neither Plaintiff’s Record Designation Application Nor Plaintiff’s Designation of the November 30 Hearing Transcript in Its Cross-Appeal Was Legally Frivolous

For all of the reasons stated in Plaintiff’s Record Designation Application, the court clerk’s failure to have provided Plaintiff a notice of default and opportunity to cure was in violation of CRC 8.130. Neither Facebook nor the OSC indicates otherwise.

The OSC indicates that it was, nonetheless, legally frivolous for Plaintiff to have requested, through the Record Designation Application, an order allowing it to designate the November 30 Hearing Transcript in Facebook’s appeal and for it to have designated the transcript in its own cross-appeal. *See* OSC, ¶ 14. The Court based these holdings on its finding that Plaintiff’s counsel had improperly engaged the reporter to transcribe the November 30 Hearing, without making proper disclosures, in violation of Gov’t Code § 70044 and CRC 1.150. *See* OSC, ¶ 14. Plaintiff’s counsel violated neither.

Facebook’s counsel, not Plaintiff’s, engaged the reporter to transcribe the hearing, *see* Lerner Decl., Ex. 3, and it did so, without the knowledge of Plaintiff’s counsel, *see* Godkin Decl., ¶ 4. Accordingly, Plaintiff’s counsel could not have disclosed to the Court that the hearing was being transcribed. Only Facebook’s counsel could have done so. Thus, if anyone

1 acted in violation of Gov't Code § 70044 or CRC 1.150, it was Facebook's counsel. Plaintiff's
2 counsel cannot be found liable for sanctions under CCP § 128.7 based thereon.

3 The OSC further indicates that it was legally frivolous for Plaintiff to have requested, in
4 the Record Designation Application, an order allowing it to designate the November 30 Hearing
5 Transcript and for it to have designated the transcript on its own cross-appeal based on the
6 Court's finding that the transcript was "unauthorized." OSC, ¶ 14. However, separate from the
7 question whether Facebook's counsel should have indicated to the Court and Plaintiff's counsel
8 that a private reporter engaged by Facebook was on the line during the November 30 Hearing,
9 Judge Weiner *had* previously authorized the parties to engage private reporters for hearings in
10 the case. *See* Lerner Decl., Ex. 1 at 90:21-23; Godkin Dec., ¶ 3, Ex. 2 at 5:11-14. Thus,
11 Plaintiff's counsel cannot be found liable for sanctions under CCP § 128.7 on the ground that
12 the November 30 Hearing Transcript was not authorized.

13 It is also worth noting that the fact that November 30 Hearing Transcript is unofficial
14 also does not make it legally frivolous for Plaintiff to have requested an order allowing it to
15 designate the transcript for use in Facebook's appeal or to have designated it for use in its own
16 cross-appeal. While CCP § 273 creates an "evidentiary presumption" that official certified
17 transcripts are "'prima facie evidence of'" the proceedings transcribed, *California Court*
18 *Reporters Assn. v. Judicial Council of California*, 39 Cal. App. 4th 15, 27 (1995) (quoting CCP
19 § 273), like any presumption, it can be overcome by convincing evidence to the contrary. And
20 while no similar evidentiary presumption attaches to unofficial certified transcripts, nothing
21 forbids their use or declares them unreliable. *Cf.* CCP § 273(b) (forbidding the use of "rough
22 drafts" created by reporters).

23 Thus, the difference between an official certified transcript and an unofficial certified
24 transcript is merely that the former carries with it an evidentiary presumption of accuracy and
25 the other's accuracy must be proven by other means. Here, that accuracy is proven by the
26 evidence that Facebook, far from challenging the accuracy of the November 30 Hearing
27 Transcript, was the party that *first* filed excerpts of that transcript with the Court and relied on
28 that transcript as accurate evidence of what occurred during the hearing, *see* Facebook OSC

Response at 2:7-8; Lerner Decl., ¶ 7, Ex. 5 at Ex. 1, as did Plaintiff, *see id.*, ¶ 8, Ex. 6 at Ex. A. Moreover, as Facebook’s counsel testifies, the Court did not object to the transcript’s use in this manner by either party. Lerner Decl., ¶ 10. Thus, Facebook is judicially estopped from taking the position on appeal that the November 30 Hearing Transcript is not reliable evidence of what occurred in the November 30 Hearing, *see generally Aguilar v. Lerner*, 32 Cal. 4th 974, 986 (2004), making Plaintiff’s position that the transcript is properly relied on by the Court of Appeal, on both Facebook’s appeal and its own cross-appeal, legally meritorious and far from frivolous.¹

The absence of any legal requirement that only “official” transcripts be designated for appeal is further supported by CRC 8.137, which provides that, in lieu of a reporter’s transcript, the parties are free to provide to the Court of Appeal a “settled statement,” which “is a summary of the superior court proceedings approved by the superior court.” CRC 8.137.

Accordingly, there is no basis on which to find that either Plaintiff’s Record Designation Application or its designation of the November 30 Hearing Transcript in its cross-appeal was legally frivolous. Far from being objectively unreasonable, both were proper and meritorious efforts by Plaintiff to ensure that the Court of Appeal has the complete record before it when it makes its decisions.

II. Nothing in Plaintiff’s Record Designation Application Is Factually Frivolous

Everything stated in Plaintiff’s Record Designation Application and accompanying papers is factually correct. This includes, without limitation, the representation in the Declaration of Allison Ehhert that the November 30th Hearing Transcript was “certified.” Declaration of Allison Ehhert ISO Plaintiff’s OSC Response, ¶ 7; *compare with* Lerner Decl.,

¹ This position is further supported by statements by Facebook’s counsel on the record that retaining private reporters to create transcripts, in this case, was necessitated by “issues with appeals.” Godkin Dec., Ex. 2 at 5:8 (statement by Mr. Lerner); *see also* Lerner Dec., Ex. 1 at 90:6-9 (Ms. Mehta: “The question that has come up, *especially in light of the writ* that was taken is, is there a way for us to bring in a private court reporter so that we can get more accelerated transcripts?”) (emphasis added).

Ex. 4 at 18 (signed certification of the reporter).² Moreover, as indicated above, Judge Weiner had authorized the parties to engage private reporters. *See* Lerner Decl., Ex. 1 at 90:21-23; Godkin Dec., ¶¶ 2-3, Ex. 2 at 5:11-14. Thus, to the extent that a failure to comply with CRC 1.150 would nullify the effectiveness of such a certification, *see* OSC at 3:27-4:1; *but see* CRC 1.150 (nowhere providing that a violation of the rule would nullify an otherwise valid certification of a transcript), it has no such effect here, because CRC 1.150 was not violated by the transcription of the November 30 Hearing. Thus, sanctions cannot be issued on the ground that Plaintiff's counsel made any factually frivolous representation, because none was made.

III. Plaintiff's Counsel Did Not File the Record Designation Application or Designate the November 30 Hearing Transcript in Its Cross-Appeal for Any Improper Purpose

Plaintiff's Counsel filed the Record Designation Application and designated the November 30 Hearing Transcript on its own cross-appeal to ensure that the Court of Appeal had the entire record before it. There is nothing improper about this, and Plaintiff's counsel should not be sanctioned on this basis.³

CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that neither it nor its counsel is liable for sanctions under CCP § 128.7. Accordingly, Plaintiff asks that the Court: (1) vacate the November 2, 2018 OSC hearing; (2) grant his Record Designation Application; and (3) order

² In light of this signed certification contained on the transcript that is attached to his own declaration, Mr. Lerner's description of the November 30 Hearing Transcript, in Facebook's OSC Response, as "an uncertified transcript," Facebook OSC Response at 1, is factually incorrect.

³ On September 26, 2018, Plaintiff filed its ex parte Record Designation Application, asking this Court to give effect to its Respondent's designation notice. The Court of Appeal docket shows that that same day this Court certified the record to the Court of Appeal, notwithstanding Plaintiff's application. Two days later, on September 28, 2018, this Court issued its OSC and set a hearing of November 2, 2018, at which it will presumably rule on Plaintiff's ex parte Record Designation Application. Because the record has now been certified to the Court of Appeal, Plaintiff must file a motion to augment in that court to protect its ability to have that court grant Plaintiff the relief he seeks—i.e., inclusion of the November 30 Hearing Transcript in the appellate record—should this Court deny Plaintiff's ex parte Record Designation Application. A motion to augment is now necessary because the Court of Appeal requires such motions to be filed within 30 days of certification of the record (which would be October 26, 2018, here), but the OSC hearing will not occur until November 2, 2018. Alternatively, should this Court be inclined to vacate the OSC hearing upon reviewing the parties' submissions, it could order the November 30 Hearing Transcript certified to the Court of Appeal as a correction of the record under California Rule of Court 8.155(b).

1 the November 30 Hearing Transcript certified to the Court of Appeal under California Rule of
2 Court 8.155(b).

3 Dated: October 4, 2018

GROSS & KLEIN LLP

BIRNBAUM & GODKIN, LLP

By: 

Stuart G. Gross, Esq.

David S. Godkin (admitted *pro hac vice*)

James E. Kruzer (admitted *pro hac vice*)

Attorneys for Plaintiff Six4Three, LLC